INDEX

	PAGE
Petition for Writ of Certiorari	1
Opinions Below	2
Jurisdiction	2
Questions Presented	2
The Statutes Involved	3
Statement of the Case	6
Reasons for Granting the Writ	10
I. A proper interpretation of the Longshoremen's and Harbor Workers' Compensation Act and The Jones Act as applied to this case would prevent the Court of Appeals from invading the province of the jury which found that the petitioner was a member of a crew and therefore within the Jones Act.	13
II. The Court of Appeals in this case has applied an arbitrary and capricious new standard without authority in law for the determination of the question of whether petitioner was a member of a crew	35
III. The Trial Court properly presented the issue to the jury which was "Was petitioner not a member of the crew at the time of the accident?"	39
Conclusion	42
Appendix	44
Opinion of the Court of Appeals for the Third Circuit dated Mar. 10, 1955	44

TABLE OF AUTHORITIES

PAGE

c. 646, Act of June 25, 1948, 62 Stat. 928, 28 U. S. C. §1254(1) 2

The Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. §901, et seq. ...3, 5, 9, 11, 12, 13, 15, 17, 23, 24, 25, 26, 27, 34, 36, 38

The Jones Act, 46 U. S. C. §688, et seq. ..3, 4, 9, 11, 12, 14, 15, 16, 17, 23, 27, 30, 36, 38, 43

The Federal Employers' Liability Act, 45 U. S. C. §51, et seq. 3, 12, 13, 16, 17, 24, 34, 36, 38

The Seventh Amendment to the Constitution of the United States 5, 25, 30

TABLE OF CASES CITED

Bound Brook, The, 146 Fed. 160 (D. C. Mass., 1906) ..11, 33

Bowen v. Shamrock Towing Co., 139 F. 2d 674 (C. C. A. 2, 1943) 27

Cantey v. McLain Line, 312 U. S. 667, 61 S. Ct. 829 (1941) 27, 30

Carumbo v. Cape Cod S. S. Co., 123 F. 2d 991 (C. C. A. 1, 1941) 41

Diomede, et al. v. Lowe, 87 F. 2d 296 (C. C. A. 2, 1937) 27

Gahagan Const. Corporation v. Armao, 165 F. 2d 301 (C. C. A. 1, 1948) 24, 41

Gonzalez v. Riverside & Fort Lee Ferry Co., 43 F. Supp. 366 (D. C., S. D. N. Y., 1942) 23, 24

Kraft v. A. H. Bull S. S. Co., 28 F. Supp. 437 (D. C., S. D. N. Y., 1939) 23, 24

PAGE

Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740 (1946) .. 24

Maryland Casualty Co. v. Lawson, 94 F. 2d 190 (C. C. A. 5, 1938) 11, 25, 26, 27

Norton v. Warner Co., 137 F. 2d 57 (C. C. A. 3, 1943), aff'd 321 U. S. 565, 64 S. Ct. 747 (1944) 11, 36

Palazzolo v. Pan Atlantic S. S. Corp., 111 F. Supp. 505 (D. C., E. D. N. Y., 1953) 20

Parker v. Motor Boat Sales, Inc., 314 U. S. 244, 62 S. Ct. 221 (1941) 31

Pennsylvania R. Co. v. O'Rourke, 344 U. S. 334, 73 S. Ct. 302 (1953) 3, 12, 13, 14, 15, 16, 17, 35

South Chicago Coal & Dock Co. v. Bassett, 309 U. S. 251, 60 S. Ct. 544 (1940) 12, 26, 29, 30, 31, 32

Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 64 S. Ct. 409 (1944) 30

The Etna, 43 F. Supp. 303 (D. C., E. D. Pa., 1942) 21

Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 63 S. Ct. 444 (1943) 24

Tucker v. Branham, 151 F. 2d 96 (C. C. A. 3, 1945) 11

United States Lighterage Corp. v. Hoey, 142 F. 2d 484 (C. C. A. 2, 1944) 11

Warner v. Goltra, 293 U. S. 155, 55 S. Ct. 46 (1934) ...11, 41

Wilkes, et al. v. Mississippi River Sand & Gravel Co., 202 F. 2d 383 (C. A. 6, 1953) 11, 38

Woods Brothers Construction Company v. Iowa Unemployment Compensation Commission, 229 Iowa 1171, 296 N. W. 345 (1941) 11

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1954. No. .

LEO A. ZIENTEK,
Petitioner,

VS.

READING COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES, OF THE SUPREME COURT OF THE UNITED STATES:

Leo A. Zientek, by his attorneys, respectfully petitions that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on March 10, 1955.

OPINIONS BELOW.

The opinion of the Court of Appeals is to be found in 220 F. 2d 183 (1955). This is a final judgment by the United States Court of Appeals for the Third Circuit, where judgment was entered for the defendant, notwithstanding the verdict for your petitioner. There is no opinion by the lower Court.

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was entered on March 10, 1955. The jurisdiction of this Court is invoked under c. 646, Act of June 25, 1948, 62 Stat. 928, 28 U. S. C. §1254 (1).

QUESTIONS PRESENTED.

1. (a) Where the evidence revealed that the duties of an employee of a railroad engaged in maritime work require him to be fully familiar with the ebb, tide and flow, currents and cross-currents, the vessel and all its appurtenances, its seaworthiness and navigability which are necessarily dependent upon how the cargo is loaded, and where such employee was alone present upon the vessel and had to exercise sole discretion to make all the decisions as to important navigational problems of the float, did not the Court of Appeals invade the function of the jury, which had found that the plaintiff was the crew of the float when injured, when it refused to be bound by that jury finding and held as a matter of law that the sole remedy available to

such employee was the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. §901 et seq.) and dismissed the action brought under The Jones Act (46 U. S. C. §688 et seq.)?

(b) Cannot the work of a railroad company employee have two separate characters, where he is in point of time sometimes a brakeman on land, and at others a seaman who is the whole crew of a float where his duties are exclusively navigational and devoted to the welfare of the vessel?

2. Is not the Court of Appeals' decision in this case contrary to the decision of this Court in *Pennsylvania R. Co. v. O'Rourke*, 344 U. S. 334, 73 S. Ct. 302 (1953), in setting up an arbitrary and capricious new standard without authority in law for the determination of the question of whether the petitioner was a "member of a crew" where the Court below asserted the crucial test to be:

> "* * * did appellee [petitioner here] have a more or less permanent connection with the car float [requiring him to work solely and exclusively upon a single named vessel] upon which he was injured?"

3. Did not counsel for the petitioner present proper points for charge to the jury which were granted by the Court which specifically stated that before the petitioner could recover under the Jones Act, the jury must first have found him to be a seaman who was a "member of the crew"?

THE STATUTES INVOLVED.

1. The Federal Employers' Liability Act, 45 U. S. C. §51 et seq., which reads as follows:

"§51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, for such injury resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, §1, 35 Stat. 65; Aug. 11, 1939, c. 685, §1, 53 Stat. 1404."

2. The Jones Act, Title 46 U. S. C. §688 et seq., which reads as follows:

"§688. Recovery for injury to or death of seaman.

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; * * * Jurisdiction in such actions shall be

under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, §20, 38 Stat. 1185; June 5, 1920, c. 250, §33, 41 Stat. 1007."

3. The Longshoremen's and Harbor Workers' Compensation Act, Title 33 U. S. C. §901 et seq., which reads as follows:

"§903 Coverage. (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

"(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

"(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

"(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another. (Mar. 4, 1927, c. 509, §3, 44 Stat. 1426.)"

4. The Seventh Amendment to the Constitution of the United States, granting the right to trial by jury, which in its pertinent parts provides:

"In suits at common law * * * the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the

United States, than according to the rules of common law."

STATEMENT OF THE CASE.

On November 26, 1948, the petitioner, Leo A. Zientek, while in the employ of the Reading Company sustained personal injury when he was thrown from a freight car while it was on a float on the Delaware River. Mr. Zientek had two jobs with the Reading Company. His job had two distinct characters. One, was as a railroader, brakeman, on land. The second was maritime in nature. It dealt with the "welfare of the float". Ninety percent of his time was devoted to his service as a brakeman (126a) bringing and taking cars into and out of the respondent's Port Richmond Yards in Philadelphia, Pennsylvania, to its docks along the Delaware River. Then as the crew of the floats, he supervised moving the cars on to floats moored at piers in and along Delaware Avenue in Philadelphia (126a).

On the date in question, the train crew had picked up some cars with a diesel yard shifter and had pushed them down to the point where they were to be placed on the float (127a). Between the cars that were to be placed on the float and the engine were a number of cars known as idlers, which are used for the purpose of providing a space between the engine and the cars that are to go up on the float (127a). In this manner, the engine itself would not have to ride over the bridge which connects the docks and the float (128a). The bridge is a movable steel structure which moves up and down so that it may adjust itself to the tide and provide a smooth run of track from Delaware Avenue on to the float (125a).

The important question involved in this case has to do with the maritime aspects of the petitioner's employment. According to the testimony of the petitioner, as the first car

reaches the point at the water's edge the train is stopped at his direction. *At this point he assumes his maritime cloak and duties.* His duties then require him to study the sea, to determine the nature of the tide whether it be high or low tide, to look at the bridge to make certain that it is in proper position, and to study the vessel to determine whether it has any list to either side and is seaworthy (129a, 131a). That is, he must determine whether it is in such condition that it can take on and properly deliver the cargo it was intended to carry (129a). In studying the tide, he is required to know whether the tide is coming in or going out. Without this knowledge, he would not be able to locate the cars properly on the float in such manner as to keep the vessel properly balanced to avoid capsizing it (129a).

Having studied the sea and determined the nature of its ebb and flow, the petitioner must walk on the bridge and inspect its pins. The pins are huge bolts that connect the float and the bridge in such manner that they keep the float properly lined up so that the tracks form a continuous line from land to vessel (129a). In addition, they keep the float in line horizontally so that there is no difference in height between the bridge and the float.

Before the petitioner allows the cars to be brought up upon the float, he has to check the hawser or slip lines which are the two lines that have to do with keeping the float properly moored in position at the dock (130a). On the vessel there are cleats, and each hawser has an eye in it that goes over a cleat. From there they run back alongside the bridge and wind on to a big drum. This tightens up the lines (130a).

Having thoroughly studied all of the relevant conditions in the interest of the welfare of the vessel, Zientek is now in a position to know that the vessel is properly moored, properly lined up and able to withstand all of the forces of wind and water that it is likely to encounter. It is then the petitioner's duty to walk up onto the vessel He walks all over its deck to make certain that it has no debris or other

substances upon it which may cause a derailment as the cars are pushed up on it.

In addition, he must check for holes or open hatches in the vessel into which persons might fall (131a). These hatches are openings over compartments of the vessel where the water ballast is. It is the duty of the petitioner to check the water ballast so that the vessel will be properly balanced and will remain in proper balance as the cargo is placed upon it. In loading a car float, as each side of the vessel receives cargo, the ballast must be proper (131a).

In determining how far back to bring the cars, he has to take into consideration the weight of the cars, the level of the vessel, and its list if any. There is a buoy out in the channel. The petitioner has to consider and study the buoy, to tell by it which way the tide is running (132a). It is naturally very important that the cars be tied down to the track very tightly, so that they will not shift, possibly causing the vessel to capsize with resultant property damage or even loss of life (133a).

While Zientek was on the vessel he was the only person on it (131a). There was no deck hand, no captain, no mate, nor anyone present other than himself who had any knowledge of the sea or an appreciation of the problems of navigation which are required in order to perform the function which he was there doing (132a). The only crew of the vessel was the petitioner (132a). He was the jack of all trades in regard to the navigation of that vessel while it was docked, at that time. He was the watchman, the inspector, and the crew itself.

Finally, when in his judgment the vessel was in proper condition to receive its cargo, he gave the signal for the engineer to back the cars onto the tracks (133a). It was he who, using his combined knowledge of railroading and seamanship, determined how far back on the vessel the cars were to be moved.

Aside from getting the cars up on the float, petitioner does not, and on that night did not, have any duty of storing the

cargo in them. He does not stow cargo (136a). He is not supplied with nor does he use grappling hooks like longshoremen use. He belongs to no longshoremen's union or organization and he performs none of the duties of a longshoreman (136a). He occasionally must throw slip lines from the deck to the bridge (136a). In totality the petitioner testified he did all these things on the night of the accident. He said that he did all of these things, at 131a:

"for the general welfare of the vessel at all times."

The car involved in the accident had a staff type brake (179a). From the deck up to the brake step from which the petitioner fell was approximately twelve feet (143a). As he attempted to set the brake, the brake worked "*inefficiently*" and "kicked", causing him to fall to the deck of the float. There were adequate facts to establish an "inefficient" brake (182a-185a).

The petitioner was in the hospital for twenty-eight days (144a). He suffered a very seriously fractured ankle which was in a cast for six months. At first he moved about on crutches (144a), and then with the aid of a cane. After his release from the hospital he reported to the out patient department for seventy individual treatments where he received therapy, heat massage and baking. He lost nineteen months and ten days from work (144a). Though back to work, he still has considerable pain, discomfort and disability in the ankle (145a).

Though counsel for the respondent, in his address to the jury, told it that the basic issue in this case was whether or not Mr. Zientek was a seaman (244a, 252a), the Trial Judge, in his charge to the jury, made it clear that the question was whether the petitioner was a "member of the crew" and as such within the coverage of the Jones Act because he was thereby excepted from the coverage of the Longshoremen's and Harbor Workers' Compensation Act. In reading to and affirming petitioner's points 2, 3, 4, 5, 6, 8 and 13 (273a-277a), the jury was clearly informed that it was to

consider whether the petitioner was a seaman and a member of the crew and, therefore, within the coverage of the Jones Act. All of these were questions of fact. The jury was instructed carefully that the usual test is whether the duties of the petitioner were duties that were "navigational" in character and in "the interest in the welfare of the vessel". After an appropriate charge along these lines, with no additional corrections asked, the jury returned a verdict in favor of the petitioner. A motion for new trial was refused. A motion for judgment n. o. v. was refused.

On appeal to the United States Court of Appeals for the Third Circuit, judgment was entered for the defendant upon the arbitrary basis that the petitioner was not assigned to any specific vessel and, therefore, had no permanent connection with that particular vessel as distinguished from a group of vessels upon which he regularly worked, all owned by the respondent. Presumably the Court admitted that the vessel was (1) in navigation; (2) that the petitioner's duties were connected with the welfare of the vessel (3) that there was no one else available or assigned to perform those duties which only a member of the crew could have performed; and finally that the Court held nonetheless that all of this was meaningless because the petitioner did not work exclusively on one single named vessel.

This petition for certiorari follows.

REASONS FOR GRANTING THE WRIT.

For the purpose of clarity a short statement of the reasons for granting the writ is here set forth. These are expanded in the argument following the brief statement.

1. The United States Court of Appeals for the Third Circuit has attempted to set up an artificial, unwarranted, capricious standard the failure to overcome which it has held

to be fatal to the prosecution of a cause of action under the Jones Act. It has held that an employee must be actively and officially associated with a particular named vessel before he may be held to be "a member of the crew" within the excepting clause of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. §901 et sec.

2. The foregoing action by the United States Court of Appeals for the Third Circuit has deprived the petitioner of the right to trial by jury of a simple factual issue which the jury had before it for determination:

Was the petitioner a member of the crew when hurt?

3. This decision is in conflict with the decision of this Court in *South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251, 60 S. Ct. 544 (1940); *Warner v. Goltra*, 293 U. S. 155, 55 S. Ct. 46 (1934). It is in contradiction with the decision in *The Bound Brook*, 146 Fed. 160 (D. C. Mass., 1906). It is in conflict with the decision of the Sixth Circuit in *Wilkes, et al. v. Mississippi River Sand & Gravel Co.*, 202 F. 2d 383 (C. A. 6, 1953), in which the employee was not assigned to any particular vessel and in fact worked on any one of four different vessels depending upon which was available when he came to work. It is in conflict with *Woods Brothers Construction Company v. Iowa Unemployment Compensation Commission*, 229 Iowa 1171, 296 N. W. 345 (1941). It is in conflict with its own decision in *Tucker v. Branham*, 151 F. 2d 96 (C. C. A. 3, 1945), and it is in conflict with the decision of the Second Circuit in *United States Lighterage Corp. v. Hoey*, 142 F. 2d 484 (C. C. A. 2, 1944) and *Norton v. Warner Co.*, 137 F. 2d 57 (C. C. A. 3, 1943), as affirmed by this Court in 321 U. S. 565, 64 S. Ct. 747 (1944). It stands alone upon the discredited opinion of the United States Court of Appeals in the Fifth Circuit in the case of *Maryland Casualty Co. v. Lawson*, 94 F. 2d 190 (C. C. A. 5, 1938).

4. The United States Court of Appeals for the Third Circuit admitted that the vessel involved had been ready for

travel and was "in navigation". It did not mention nor dispute the fact that your petitioner had multiple navigational duties to perform which involved the exercise of discretion and were directed exclusively toward the "welfare of the vessel", including the one act of tightening the brake at the very end of all of his duties in order to assure its seaworthiness.

5. The Court below relied upon the opinion of the Court of Appeals of the Fifth Circuit in *Maryland Casualty Co. v. Lawson,* supra, the conflict of which opinion with the opinion of the Court of Appeals in *South Chicago Coal & Dock Co. v. Bassett,* supra, led the Court to grant certiorari and disagree with the holding of the *Lawson* case, supra, upon which this Court relied to arrive at its arbitrary conclusion.

6. The holding of the Court below is in direct irreconcilable contradiction to holdings of this Court, to those of various inferior Courts of Federal jurisdiction, and indeed to other holdings of its own. The Court below decided that the Federal Employers' Liability Act does not apply to this case, relying upon the decision of this Court in *Pennsylvania R. Co. v. O'Rourke,* supra, and hence only the Longshoremen's and Harbor Workers' Compensation Act was available to petitioner. That case is in no way dispositive of this issue because in that case it was stipulated between counsel that the petitioner's remedies were either under the Federal Employers' Liability Act or the Longshoremen's and Harbor Workers' Compensation Act. This Court was excluded by agreement of counsel from consideration of the question of whether the Jones Act and the admiralty principle of seaworthiness were involved. This specific question is, therefore, reserved for determination at this time where it has been presented directly to the Courts below and is now fresh for decision by this Court.

7. The decision of this Court in the *O'Rourke* case, supra, that the Federal Employers' Liability Act does not apply

to railroaders who are momentarily upon a vessel was decided by a five to four decision. The Court at that time was not given the benefit of adequate and proper briefing by counsel that presented the matter to it and the matter is of such primary importance to railroaders at large that it is vital that the question be reviewed again at this time as to whether the Federal Employers' Liability Act itself does not apply.

8. It is incumbent upon this Court in the present case to grant certiorari, because to fail to do so, is not only to permit the unlawful assertion of an arbitrary and capricious standard by which to determine the applicability of the Jones Act or the inapplicability of the Longshoremen's and Harbor Workers' Compensation Act, but in addition it presents an invitation in these cases to Courts below to ascribe various and sundry artificial, unreasoning and unjustified bases as means of which to distinguish, differentiate, all to the purpose of denying to seamen the remedies intended by the Congress of the United States for their protection, the net effect of which will be to degrade and lower their standards in the labor field to that of common laborers with no particular skill and ability and no reward for such effort.

I. A proper interpretation of the Longshoremen's and Harbor Workers' Compensation Act and the Jones Act as applied to this case would prevent the Court of Appeals from invading the province of the jury which found that the petitioner was a member of a crew and therefore within the Jones Act.

The petitioner here is both a railroad brakeman and a maritime employee. He is not in the same factual situation as the respondent in *Pennsylvania R. Co. v. O'Rourke*, supra. In that case, this Court did not have before it the question involved in this case, which is—whether or not there was

sufficient evidence for a jury to find that the injured person was a member of a crew. The parties to that suit had stipulated that the employee was not under the Jones Act. O'Rourke had *no* navigational duties to perform. Here, this sometimes railroader was injured while he was the sole person aboard the float. All navigational duties necessary to be performed for the welfare of the vessel had been committed to him alone. Having before it a factual array from which it could conclude the employee was a seaman and the float's whole crew and that all his duties on board were devoted to the welfare of the vessel, the jury decided he was a member of the crew and awarded damages under the Jones Act. *The Court of Appeals below held as a matter of law that the employee was not a "member of the crew" because his duties as an employee of this defendant were not exclusively and totally on this one vessel and on none other and at no other place.*

It must be recognized at the outset that the petitioner here is sometimes a railroad worker and sometimes a seaman. It must also be admitted that the precise question here involved has never been decided by this Court. It is: May the Court of Appeals reverse a jury finding that the injured worker was a seaman and a member of a crew by considering the worker's duties at times other than the time of his injury? More specifically, may the Court of Appeals invade the province of the jury and decide *as a matter of law* that the injured worker was not a member of a crew upon two facts—First, that part of the day he was a railroader and Second, that his maritime duties were performed on more than the one barge on which he was injured.

This decision completely ignores the mandate by this Court in *Pennsylvania R. Co. v. O'Rourke,* supra, that it *is* the injured worker's *particular* activity *at the time of the injury* which determines whether he was a member of a crew.

In *Pennsylvania R. Co. v. O'Rourke,* supra, this Court in a five to four decision decided that a railroad employee who

was injured while over navigable waters was covered by the Longshoremen's and Harbor Workers' Compensation Act, because his employer was engaged in maritime employment. This Court rejected the contention of the respondent in that case relied upon by the Court of Appeals to the effect that the employee's duties were determinative of whether or not he was entitled to recover under the Federal Employers' Liability Act or was relegated to the Longshoremen's and Harbor Workers' Compensation Act. This Court said, at page 305:

> "We are clear, however, that the emphasis on the nature of respondent's duties here misses the mark. The statute applies, by its own terms, to accidents on navigable waters when the employer has any employees engaged in maritime service. The portions of the Nogueira opinion quoted bring this railroad company within this category, since its car float operations are there held to be maritime, as they obviously are. Whether the injury occurred to an employee loading freight into cars on the float, as in the Nogueira case, or to one like respondent moving loaded cars from a float could make no difference. Both employments are maritime. See Nogueira v. New York, N. H. & H. R. Co., supra, 281 U. S. at page 134, 50 S. Ct. at page 304. Besides §902(4) is directed at the employer when it speaks of maritime employment, not at the work the employee is doing. The exclusive coverage of §§903, 905 extends to an employee of an employer, made liable by §904, when he is injured, in the course of his employment, on navigable water. The Court of Appeals, we think, is in error in holding that the statute requires, as to the employee, both injury on navigable water and maritime employment as a ground for coverage by the Compensation Act. *An injured worker's particular activity at the time of injury determines of course* whether he was injured in the course of his employment within §902(2), and *whether he was a member of the crew of the vessel*

> *within the exceptions of* §§902(3) *and* 903(a)(1). This explains the emphasis on the factor of the individual's job in Parker v. Motor Boat Sales, Inc., 314 U. S. 244, 245-246, 62 S. Ct. 221, 222-223, 86 L. Ed. 184, and South Chicago Coal & Dock Co. v. Bassett, 309 U. S. 251, 60 S. Ct. 544, 84 L. Ed. 732." (Emphasis ours.)

Thus, this Court has affirmatively stated that "*an injured worker's particular activity at the time of injury determines whether he was a member of the crew of the vessel* within the exceptions of §§902(3) and 903(a)(1)."

The Court of Appeals for the Third Circuit in this case ignored this language and relied upon the fact that the petitioner on other occasions engaged in railroading work, and worked on other car floats. They used this evidence to hold as a matter of law, that the petitioner did not have a more or less permanent connection with the car float upon which he was injured and that, therefore, he could not be found by the jury to be a member of the crew.

At the time that this Court decided the case of *Pennsylvania R. Co. v. O'Rourke*, supra, by a five to four decision, no argument was made concerning the applicability of the Jones Act. It, therefore, may well be that this Court at that time did decide *Pennsylvania R. Co. v. O'Rourke*, supra, properly. However, there can be no doubt that the Jones Act was intended to give persons in the same position as the petitioner here the same remedies as those afforded to railroaders injured on shore, and if the test of the workers' particular activity is used to determine whether he is a member of the crew, the petitioner here falls within such test.

It is this language and this all important test which the Court of Appeals has rejected and it is this rejection which has resulted in an erroneous decision in this case.

Actually, the decision of this Court in *O'Rourke*, supra, has said that in so far as determining whether an individual is covered by the Federal Employers' Liability Act or the

Longshoremen's and Harbor Workers' Compensation Act it is immaterial as to what *his* duties were at the particular time of the injury. *But, on the other hand, this Court in O'Rourke, supra, has also said, that it is only his duties at the time of the injury which determine whether he was a member of a crew.*

The interaction of the decision in *O'Rourke*, supra, and the decision in the instant case places thousands of injured workers who are precisely in the position of the petitioner in a status which Congress never intended. In other words, the *O'Rourke*, supra, decision, in brief, states his duties as a railroader do not aid in placing him under the Federal Employers' Liability Act. The decision in the instant case uses his duties as a railroader and his duties on other barges to prevent him *as a matter of law* from being under the Jones Act. This reaches the anomalous result that the petitioner although normally within the Federal Employers' Liability Act now may *not* because of his activities which would place him under the Federal Employers' Liability Act recover under a statute which gave to seamen the same rights as the injured worker had under the Federal Employers' Liability Act.

If the proper test of "the injured workers' particular activities at the time of his injury" is applied there can be no doubt that he would be a member of a crew.

We submit the error of the Court below arises from a misconception of the true holding of *O'Rourke*, supra. That case held:

(1) We look to the *employer's* business to determine whether the case involves a maritime tort. If it does, the Federal Employers' Liability Act does not apply; then,

(2) Once we decide the Federal Employers' Liability Act does not apply, we look to the *employee's* duties, to determine if the employee is *excepted* from the Longshoremen's and Harbor Workers' Compensation Act and entitled to the remedies of the Jones Act.

The important question involved in this case has to do with the maritime aspects of the petitioner's employment. According to the testimony of the petitioner, as the first car reaches the point at the water's edge the train is stopped at his direction. *At this point he assumes his maritime cloak and duties.* His duties then require him to study the sea, to determine the nature of the tide whether it be high or low tide, to look at the bridge to make certain that it is in proper position, and to study the vessel to determine whether it has any list to either side and is seaworthy (129a, 131a). That is, he must determine whether it is in such condition that it can take on and properly deliver the cargo it was intended to carry (129a). In studying the tide, he is required to know whether the tide is coming in or going out. Without this knowledge, he would not be able to locate the cars properly on the float in such manner as to keep the vessel properly balanced to avoid capsizing it (129a).

Having studied the sea and determined the nature of its ebb and flow, the petitioner must walk on the bridge and inspect its pins. The pins are huge bolts that connect the float and the bridge in such manner that they keep the float properly lined up so that the tracks form a continuous line from land to vessel (129a). In addition, they keep the float in line horizontally so that there is no difference in height between the bridge and the float.

Before the petitioner allows the cars to be brought up upon the float, he has to check the hawser or slip lines which are the two lines that have to do with keeping the float properly moored in position at the dock (130a). On the vessel there are cleats, and each hawser has an eye in it that goes over a cleat. From there they run back alongside the bridge and wind on to a big drum. This tightens up the lines (130a).

Having thoroughly studied all of the relevant conditions in the interest of the welfare of the vessel, petitioner is now in a position to know that the vessel is properly moored, properly lined up and able to withstand all of the forces of

wind and water that it is likely to encounter. It is then the petitioner's duty to walk up on to the vessel. He walks all over its deck to make certain that it has no debris or other substances upon it which may cause a derailment as the cars are pushed up on it.

In addition, he must check for holes or open hatches in the vessel into which persons might fall (131a). These hatches are openings over compartments of the vessel where the water ballast is. It is the duty of the petitioner to check the water ballast so that the vessel will be properly balanced and will remain in proper balance as the cargo is placed upon it. In loading a car float, as each side of the vessel receives cargo, the ballast must be proper (131a). In determining how far back to bring the cars, he has to take into consideration the weight of the cars, the level of the vessel, and its list, if any. It is naturally very important that the cars be tied down to the track very tightly, so that they will not shift, possibly causing the vessel to capsize with resultant property damage or even loss of life (133a).

There is a buoy out in the channel. The petitioner has to consider and study the buoy, to tell by it which way the tide is running (132a).

While petitioner was on the vessel he was the only person on it (131a). There was no deck hand, no captain, no mate, nor anyone present other than himself who had any knowledge of the sea or an appreciation of the problems of navigation which are required in order to perform the function which he was there doing (132a). The whole crew of the vessel was the petitioner (132a). He was the jack of all trades in regard to the navigation of that vessel while it was docked, at that time. He was the watchman, the inspector, and the crew itself.

Finally, when in his judgment the vessel was in proper condition to receive its cargo, he gave the signal for the engineer to back the cars on to the tracks (133a). It was he who, using his combined knowledge of railroading and

seamanship, determined how far back on the vessel the cars were to be moved.

Aside from signalling the cars up on the float, petitioner does not, and on that night did not, have any duty of storing the cargo in them. He does not stow cargo (136a). He is not supplied with nor does he use grappling hooks like longshoremen use. He does not personally move the cars on to the float any more than the mate moves cargo when he signals the longshoremen to start or stop loading or unloading or tells them into which hatch or hold to place the cargo. He belongs to no longshoremen's union or organization and he performs none of the duties of a longshoreman (136a). He occasionally must throw slip lines from the deck to the bridge (136a). In totality, the petitioner testified he did all these things on the night of the accident.

He said that he did all of these things, at 131a:

> "for the general welfare of the vessel at all times."

Under this statement of the facts supported by the record the petitioner was a "member of a crew". He was the whole crew. Whenever any vessel is loaded there is a "member of the crew" present primed with seamanship who directs the work. Such was this employee, Zientek. It is well known that this is the officer of the deck or the cargo officer whose job it is to do this for the safety of the vessel. See *Palazzolo v. Pan Atlantic S. S. Corp.*, 111 F. Supp. 505, 506-507 (D. C. E. D. N. Y., 1953), where the testimony of this officer was summarized as follows:

> "The record shows that at the time of the accident Captain Fischer was the second mate of the S. S. Canton Victory. According to his testimony on direct examination, Ryan's job was to load cargo at Georgetown, 'however to the general satisfaction of the mate in charge of the vessel, the master, and the chief officer and his under officers'. Fischer said that one of his jobs was to 'go in and out of each of the five holds, and * * * check

to see that they (Ryan) were loading the cargo properly and *chocking* it' and that the 'primary job, of course, was watching the cargo, this is in port, and to see that it is loaded and stowed properly for the safety of the vessel and the cargo and crew that sails the vessel'. (Emphasis supplied.) On cross-examination he stated that he also took into consideration the safety of the longshoremen who were to discharge the cargo, and that had he seen pieces of dunnage used instead of wedges he would have done something about it. He testified that he was in hold No. 3, where the accident occurred, both at the time of loading and unloading, to see that everything was properly done and that he was 'primarily concerned to check the damage or the pilferage or *any unsafe method or practice*.' (Emphasis supplied.) It was his contention that the vessel generally carried a quantity of chocks aboard as part of the ship's gear, and that there were chocks on the dock and that Ryan's men used them to stow the cargo. He agreed that if he had seen anything wrong he would have complained to the hatch boss or to the pier superintendent of the stevedore, but that everything was properly done by Ryan and that he made no complaints."

See also *The Etna*, 43 F. Supp. 303, 305 (D. C. E. D. Pa., 1942), where it was said:

"With respect to the duty of the respondents, it is established that the owner of a vessel owes to stevedores engaged upon the vessel, even though they be employed by an independent contractor, the duty of exercising reasonable diligence to furnish a safe place in which they may perform their services, and to notify them of any latent dangers or defects in the vessel. Grays Harbor Stevedore Co. v. Fountain, 9 Cir., 5 F. 2d 385; The Chicago, D. C., 156 F. 374. *It is likewise recognized that the master of a vessel has the duty of*

> *seeing that the cargo is properly stowed,* Carter v. Brown, 5 Cir., 212 F. 393, and, where an injury occurs to a stevedore unloading a cargo as a result of negligent loading, the ship and her owner cannot escape liability by showing that the loading was done by an independent contractor who employed competent stevedores. Munson S. S. Lines v. Newman, 5 Cir., 24 F. 2d 416. In the case at bar, therefore, the ship and her owner are responsible for the improper and negligent stowage of the cargo which resulted in the injury to the libellant." (Emphasis ours.)

It is extremely important in this case to remember that the Court of Appeals decided *as a matter of law* that the petitioner was not a "member of a crew". Petitioner must succeed in this case if the decision of the fact finding body (in this case a jury) is a reasonable inference from the evidence. The Court of Appeals gives lip service to this proposition when it states:

> "The jury found that appellee was a master or member of a crew of a vessel. If the facts, which are largely undisputed, support this finding or if different conclusions can reasonably be drawn from such facts, the jury's finding must stand. South Chicago Coal & Dock Co. v. Bassett, 309 U. S. 251 (1940); Gahagan Const. Corporation v. Armao, 165 F. 2d 301, 305 (C. C. A. 1, 1948)."

We say gives lip service for the Court of Appeals, without reviewing, or even mentioning the facts stated above in support of petitioner's contention, cursorily reversed the judgment for petitioner. They did this apparently only because the petitioner at times *other* than the time he was injured worked sometimes as a railroader and sometimes performed maritime services on other barges.

As a matter of fact, the Court of Appeals in support of its conclusion cites two cases which actually support the op-

posite conclusion—viz. that the question of the petitioner's status was a question for the jury.

The Court of Appeals characterizes the petitioner's position in the following manner:

> "The position is more like the employee in *Gonzalez v. Riverside and Fort Lee Ferry Co.*, 43 F. Supp. 366, D. C. S. D. N. Y., 1942 * * *"

An examination of that case reveals that the petitioner brought a libel suit under the Jones Act. Therefore, the Trial Judge was the one to decide both questions of law and questions of fact. It is quite clear from the opinion in that case that the Trial Judge dismissed the libel *only* because he found as a *matter of fact* that the libellant was covered by the Longshoremen's and Harbor Workers' Compensation Act rather than the Jones Act. Indeed, the Trial Judge stated in his opinion in *Gonzalez v. Riverside & Fort Lee Ferry Co.*, 43 F. Supp. 366 (D. C. S. D. N. Y., 1942), at page 366:

> "The question presented is one of fact."

Thus, if the Court of Appeals was correct in its conclusion that the petitioner in the instant case is "more like the employee in the *Gonzalez* case", that case supports the conclusion contended for by Mr. Zientek rather than the conclusion reached by the Court of Appeals. All that we contend here is that whether Mr. Zientek was a longshoreman or a member of a crew was a question of fact. In the *Gonzalez* case, supra, the Court held that it was a question of fact. The Court of Appeals has placed this petitioner in a position analogous to the libellant in the *Gonzalez* case, supra. Thus, he should be treated the same as the plaintiff in the *Gonzalez* case, supra.

He is entitled to a finding of fact by the duly authorized fact finding body. Here it was the jury. It found for him.

The Court of Appeals also places the petitioner in a position analogous to the plaintiff in the case of *Kraft v. A. H.*

Bull S. S. Co., 28 F. Supp. 437 (D. C. S. D. N. Y., 1939). Again, in that case a suit in admiralty was brought by the libellant under the Jones Act. The Court sitting without a jury decided that the plaintiff was under the Longshoremen's and Harbor Workers' Compensation Act. We submit that this was decided as a question of *fact* rather than a question of law.

It can readily be seen that two cases which decide *as a question of fact* that an injured individual is not a member of a crew cannot possibly support the proposition that the petitioner here was *as a matter of law* not a member of a crew. It is just as startling as a Court citing *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1946) and *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444 (1943), for the proposition that a Federal Employers' Liability Act case should not be decided by a jury where there is factual support of negligence and proximate cause in the record.

Indeed, since the Court of Appeals has characterized the petitioner's position as similar to that of the plaintiffs in *Gonzalez*, supra, and *Kraft*, supra, it is just the same as if a Court said:

> "This case is like Lavender v. Kurn and therefore we do not let a jury decide the issue."

In *Gahagan Const. Corporation v. Armao*, 165 F. 2d 301 (C. C. A. 1, 1948), the jury found that the plaintiff was a member of a crew. The Circuit Court of Appeals for the First Circuit affirmed holding that it was a question for the jury to decide. Let us suppose that the jury in the instant case decided that the petitioner was not a member of a crew and further let us assume that the Court of Appeals said that the petitioner's position was like the employee in the *Gahagan* case, supra, and in consequence thereof they held the employee was *as a matter of law* a member of a crew. There could be no doubt that under such circumstances the Court of Appeals would be in error. The converse naturally follows.

The *Gahagan* case, supra, stands for the proposition that whether the employee was a member of a crew or not *was for the jury.* The *Gonzalez* case, supra, and the *Kraft* case, supra, stand for the proposition that the question of the injured worker status was a question of fact for the *Judge sitting as a jury to decide.* We only ask here that the Court of Appeals allow the fact finding body—in the instant case a jury—to decide the issue of fact here involved. To hold otherwise, is to deprive the petitioner of his right to trial by jury under the Seventh Amendment of the Constitution of the United States.

The Court of Appeals also states and relies heavily upon the case of *Maryland Casualty Co. v. Lawson,* 94 F. 2d 190 (C. C. A. 5, 1938). There can be no doubt that the *Lawson* case, supra, is no longer the law in stating the principles to be applied in deciding whether or not the fact-finding body (whether it be the Deputy Commissioner in a Longshoremen's and Harbor Workers' Compensation Act case, or the jury or the Trial Judge acting in his capacity as a fact-finder), correctly decided the question of whether the plaintiff was a member of a crew of a vessel. In *Maryland Casualty Co. v. Lawson,* supra, the Deputy Commissioner held that the plaintiff came under the Longshoremen's and Harbor Workers' Compensation Act. The District Court apparently upheld the position of the Deputy Commissioner. The Court of Appeals in reversing this holding stated that the decision of the Deputy Commissioner was not conclusive, even though there was a finding of fact. The Court said:

> "Was Burrows an employee within the Act so that the Deputy Commissioner had jurisdiction? This is a question on which his fact findings are not conclusive."

The Court further stated:

> "The evidence is in no conflict."

They held that the plaintiff was a member of a crew.

In *South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251, 60 S. Ct. 544 (1940), (another case relied upon by the Court of Appeals), this was the situation. The Deputy Commissioner found the decedent to be under the Longshoremen's and Harbor Workers' Compensation Act. The District Court granted a trial de novo and found that the decedent was a member of a crew. The Court of Appeals found that the evidence before the District Court was the same as that held by the Deputy Commissioner; that the facts were not in dispute; and that the District Court in reviewing the finding of the Deputy Commissioner was obliged to accept the Deputy Commissioner's finding of fact as to whether or not the plaintiff was a longshoreman or a member of a crew.

This Court granted certiorari upon the allegation that the decision of the Court of Appeals in *South Chicago Coal & Dock Co. v. Bassett*, supra, was contrary to the holding in *Maryland Casualty Co. v. Lawson*, supra. The Supreme Court then went on to state at page 548:

> "So far as the decision that this employee, who was at work on this vessel in navigable waters when he sustained his injuries, was or was not 'a member of a crew' turns on questions of fact, the authority to determine such questions has been confided by Congress to the deputy commissioner."

They further said:

> "Petitioners urge that the question whether the decedent was a member of a 'crew' was a question of law. That is, that upon the undisputed facts the decedent must be held as a matter of law to have been a member of a 'crew' as distinguished from a longshoreman or laborer at work upon the vessel. We are unable so to conclude."

Thus, the Supreme Court held in that case that the Court of Appeals' decision was correct and affirmed the judgment. The precise holding of the case was that there was evidence from which the Deputy Commissioner could find that the plaintiff was a longshoreman and the District Court was bound by the Deputy Commissioner's finding. It is of particular significance that the Court rejected the ruling of *Maryland Casualty Co. v. Lawson*, supra, which gave the District Court authority to inquire into the conclusion reached by the Deputy Commissioner.

We thus have a situation where the Supreme Court of the United States has said that the finding as a fact that the particular individual was a seaman or a longshoreman cannot be inquired into by the reviewers of such finding. If it be contended that this rule regarding the review of the findings of fact is only applicable in cases which arise before the Deputy Commissioner and proceed from him to the reviewing authorities, this Court has set that problem at rest.

This Court has specifically held that the Courts of Appeals must review a finding of a jury in the same light as the District Court reviews the finding by the Deputy Commissioner. In *Bowen v. Shamrock Towing Co.*, 139 F. 2d 674 (C. C. A. 2, 1943), the Circuit Court of Appeals for the Second Circuit reviewed at length the situation with respect to individuals like this petitioner who were employed upon barges.

In that case the plaintiff brought an action under the Jones Act. The defendant contended that the plaintiff's exclusive remedy was under the Longshoremen's and Harbor Workers' Compensation Act. The facts were stipulated, and the District Court on the authority of *Diomede et al. v. Lowe*, 87 F. 2d 296 (C. C. A. 2, 1937), dismissed the complaint. The Second Circuit reversed on the ground that the *Diomede*, supra, decision was not controlling.

In view of this Court's decision in *Cantey v. McLain Line*, 312 U. S. 667, 61 S. Ct. 829 (1941), the Court of Appeals for the Second Circuit said, in *Bowen v. Shamrock Towing Co.*, supra:

"The Longshoremen's and Harbor Workers' Compensation Act excludes from its provisions 'A master or member of a crew of any vessel'. 33 U. S. C. A. §903 (a) (1). Unless excepted by this clause, the plaintiff's remedy against his employer must be sought under the Act. 33 U. S. C. A. §905; South Chicago Co. v. Bassett, 309 U. S. 251, 256, 60 S. Ct. 544, 84 L. Ed. 732. The cases involving bargemen employed on vessels without motive power of their own have left in some uncertainty the question whether such employees are within or outside the coverage of the Compensation Act. Considering himself bound by our decision in Diomede v. Lowe, 2 Cir., 87 F. 2d 296, certiorari denied Moran Brothers Contracting Co. v. Diomede, 301 U. S. 682, 57 S. Ct. 783, 81 L. Ed. 1340, the District Judge held that the plaintiff was within the Act's coverage. It is the contention of the appellant that the Diomede decision cannot be deemed controlling in view of Cantey v. McLain Line, 312 U. S. 667, 61 S. Ct. 829, 85 L. Ed. 1111.

"[2, 3] We think this contention is sound. Diomede v. Lowe, supra, held that the bargee of a dump scow, whose widow claimed compensation under the Act, was within its coverage, although the deputy commissioner had found to the contrary. The Cantey case, like the case at bar, involved a suit brought by a bargee under the Jones Act. Exceptions asserting that Cantey was entitled to compensation as a harbor worker were sustained by the District Court, 32 F. Supp. 1023, and we affirmed on the authority of the Diomede case. Cantey v. McLain Line, 2 Cir., 114 F. 2d 1017. In a brief Per Curiam, 312 U. S. 667, 61 S. Ct. 829, 85 L. Ed. 1111, the Supreme Court reversed, remanding the cause to the District Court for further proceedings and citing as authority South Chicago Co. v. Bassett, 309 U. S. 251, 258, 259, 60 S. Ct. 544, 84 L. Ed. 732. Thus the Cantey case appears to be indistinguishable from the case at bar, unless a distinction can be found in the fact,

stressed by the appellee, that Cantey's barge was in tow at the time of the accident while the appellant's barge was tied up at a pier. We do not regard this as a material difference. A vessel is not withdrawn from navigation by being tied up for a short time awaiting a new cargo. See Hawn v. American S. S. Co., 2 Cir., 107 F. 2d 999, 1000; Carumbo v. Cape Cod S. S. Co., 1 Cir., 123 F. 2d 991, 995. And whether or not a barge is in tow at the time of his accident does not necessarily determine whether the bargee is 'a master or member of a crew of any vessel.' We think the Cantey case is controlling."

The Second Circuit then reviewed the significance of this Court's citation of *South Chicago Coal & Dock Co. v. Bassett*, supra, in reversing the *Cantey* case, supra. They said:

"As the Supreme Court's brief opinion indicates by its reference to pages 258-259 of the Bassett case, 309 U. S. 251, 60 S. Ct. 544, page 548, 84 L. Ed. 732, the word 'crew' does not have an unvarying legal significance. The Bassett opinion makes clear that whether a given employee is or is not a 'member of a crew' turns on questions of fact; and when compensation is claimed under the Longshoremen's and Harbor Workers' Compensation Act the authority to determine such questions is the deputy commissioner, whose finding, if there is evidence to support it, is made conclusive. Cf. Warner Co. v. Norton, 3 Cir., 137 F. 2d 57. *When, however, an employee sues under the Jones Act the question whether he is to be classified as a seaman or as a harbor worker covered by the Compensation act presents issues of fact for determination by the jury or the court, as the case may be.* Carumbo v. Cape Cod S. S. Co., 1 Cir., 123 F. 2d 991, 994." (Emphasis ours.)

It is clear from the situation which we now have that a finding by the jury is as conclusive as a finding by a Deputy

Commissioner that a particular individual is a longshoreman or a member of a crew.

The situation presented is this: The Court of Appeals has cited and relied upon cases in which an individual was found as a matter of fact to be a longshoreman or a member of a crew. They have thus impliedly recognized that there was an issue of fact involved in the determination of the question of whether Mr. Zientek was a longshoreman or a member of a crew. They have failed, however, to abide by this Court's decision in *South Chicago Coal & Dock Co. v. Bassett*, supra, and *Cantey v. McLain Line*, supra.

The result of this decision deprives the petitioner of his right to have a trial by jury under the Seventh Amendment, and is at variance with the decisions of this Court.

Congress by enacting The Jones Act has given certain maritime workers the same protection as is afforded to railroaders. This Court has zealously and properly guarded the right to trial by jury on behalf of railroaders and seamen. In *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409, 412 (1944), the Court said:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. *It is the jury, not the court, which is the fact-finding body.* It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Washington & Georgetown R. Co. v. McDade, 135 U. S. 554, 571, 572, 10 S. Ct. 1044, 1049, 34 L. Ed. 235; Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 68, 63 S. Ct. 444, 451, 143 A. L. R. 967; Bailey v. Cen-

tral Vermont Ry., 319 U. S. 350, 353, 354, 63 S. Ct. 1062, 1064, 87 L. Ed. 1444. *That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.*" (Emphasis ours.)

There are many other cases holding likewise. This determination of a question of fact is strictly a jury function, whether it be the determination of the presence or absence of negligence, causation, character of employment, whether intra or inter state commerce, whether within or without the course of employment, or any other factual determination needed to be reached.

We find by an examination of the cases even in this very field, that this Court has held that it is a jury function to determine by the duties performed by the employee in each particular case whether he be a longshoreman or a seaman. Thus, in the *South Chicago Coal & Dock Co. v. Bassett,* case, supra, the Supreme Court said:

> "So far as the decision that this employee, who was at work on this vessel in navigable waters when he sustained his injuries, was or was not 'a member of a crew' turns on *questions of fact*, the authority to determine such questions has been confided by Congress to the deputy commissioner." [The fact-finder in this case.] (Emphasis ours.)

The same was said in *Parker v. Motor Boat Sales, Inc.,* 314 U. S. 244, 62 S. Ct. 221 (1941).

Apparently, the Court conceded that the vessel was in navigation. It naturally had to do so in view of the following language in *South Chicago Coal & Dock Co. v. Bassett,* supra:

"* * * a member of a crew is one of those employees who are naturally and primarily on board to aid in her navigation."

That case then went on to define navigation:

"There remains to be defined the word 'navigation.' It has been held that a ship is not in navigation if there is no present hope or intention of having her go to sea and if it would take a long time to put her in shape for an ocean voyage. Gonzalez v. United States Shipping Board, supra. Furthermore, a ship is not in navigation which has been laid up for the winter. Seneca Washed Gravel Corp. v. McManigal, supra. A ship is in navigation, however, when it returns from a voyage and is taken to dry dock to undergo repairs preparatory to making another trip. Hunt v. United States, supra; Hawn v. American S. S. Co., supra. It is our opinion that a ship is in navigation, although docked, if it remains in readiness for another voyage. It need not be under contract."

The Court below ignored what this Court said in the same case at page 548:

"*Petitioners urge that the question whether the decedent was a member of a 'crew' was a question of law.* That is, that upon the undisputed facts the decedent must be held as a matter of law to have been a member of a 'crew' as distinguished from a longshoreman or laborer at work upon the vessel. *We are unable so to conclude.*

"*The word 'crew' does not have an absolutely unvarying legal significance.* As Mr. Justice Story said in United States v. Winn, 3 Sumn. 209,[11] the general sense of the word crew is 'equivalent to ship's company' which would embrace all the officers as well as the common seamen. But it was observed that the laws

upon maritime subjects sometimes used the word crew in that general sense and 'sometimes in other senses, more limited and restrained.' 'It is sometimes used to comprehend all persons composing the ship's company, including the master; sometimes to comprehend the officers and common seamen, excluding the master; and sometimes to comprehend the common seamen only, excluding the master and officers.' It was therefore deemed necessary to consider the context of the particular use of the term and the object to be accomplished by the enactment under consideration. In the Bound Brook, D. C., 146 F. 160, 164, it was said that 'When the "crew" of a vessel is referred to, those persons are naturally and primarily meant who are on board her aiding in her navigation, without reference to the nature of the arrangement under which they are on board'. Judge Hough in The Buena Ventura, D. C., 243 F. 797, 799, thought that statement was a fair summary, and in his view one who served the ship 'in her navigation' was a member of the 'crew.' Id., 243 F. page 800. See, also, Seneca Washed Gravel Corp. v. McManigal, 2 Cir., 65 F. 2d 779. Recently, in considering the application of the Jones Act to 'any seaman,' we adverted to the 'range of variation' in the use of the word 'crew', and it was again emphasized that what concerned us in that case, which had relation to the status of a 'master', was 'not the scope of the class of seamen at other times and in other contexts.' We said that our concern there was 'to define the meaning for the purpose of a particular statute which must be read in the light of the mischief to be corrected and the end to be attained.' Warner v. Goltra, 293 U. S. 155, 158, 55 S. Ct. 46, 47, 48, 79 L. Ed. 254.

"That is our concern here in construing this particular statute—the Longshoremen's and Harbor Workers' Compensation Act—with appropriate regard to its distinctive aim. We find little aid in considering

the use of the term 'crew' in other statutes having other purposes. This Act, as we have seen, was to provide compensation for a class of employees at work on a vessel in navigable waters who, although they might be classed as seamen (International Stevedoring Company v. Haverty, supra), were still regarded as distinct from members of a 'crew'. They were persons serving on vessels, to be sure, but their service was that of laborers, of the sort performed by longshoremen and harbor workers and thus distinguished from those employees on the vessel who are naturally and primarily on board to aid in her navigation. See De Wald v. Baltimore & Ohio R. Co., 4 Cir., 71 F. 2d 810; Diomede v. Lowe, 2 Cir., 87 F. 2d 296; Moore Dry Dock Co. v. Pillsbury, 9 Cir., 100 F. 2d 245.

"Regarding the word 'crew' in this statute as referring to the latter class, we think there was evidence to support the finding of the deputy commissioner. The fact that the certificate of inspection called for three 'deckhands' and that the captain included the decedent to make up that complement is not controlling. *The question concerns his actual duties.* These duties, as the Court of Appeals said, did not pertain to navigation, aside from the incidental task of throwing the ship's rope or making the boat fast, a service of the sort which could readily be performed or aided by a harbor worker." (Emphasis ours.)

To allow the Third Circuit decision in this case to stand is to permit a serious invasion into this right to trial by jury under the guise of deciding that no inference could be drawn that the petitioner was protected by the Jones Act on the sole basis that at times other than the time of his injury he performed other duties.

II. The Court of Appeals in this case has applied an arbitrary and capricious new standard without authority in law for the determination of the question of whether petitioner was a member of a crew.

The vice of the opinion of the Court of Appeals is found in the following paragraph:

> "But did appellee have a more or less permanent connection with the car float upon which he was injured? We think not. There were twenty or twenty-two floats involved in the box car loading operation. Appellee did not load one particular barge but loaded whatever float happened to be in the slip at the time. In fact, appellee testified that he thought he had been injured upon barge No. 12 but he was not positive. His counsel, however, stipulated that it was barge No. 14. He obviously did not have any permanent connection with any particular float."

This paragraph is the sole basis for the decision by the Court of Appeals. It applies a test which is utterly and completely in conflict with the decision of this Court in the *O'Rourke* case, supra. This Court there said, [*Pennsylvania R. Co. v. O'Rourke,* 344 U. S. 334, 340, 73 S. Ct. 302 (1953)]:

> "*An injured worker's particular activity at the time of injury determines of course* whether he was injured in the course of his employment within §902(2), and *whether he was a member of the crew of the vessel within the exceptions of §§902(3) and 903(a)(1).* This explains the emphasis on the factor of the individual's job in Parker v. Motor Boat Sales, Inc., 314 U. S. 244, 245-246, 62 S. Ct. 221, 222-223, 86 L. Ed. 184, and South Chicago Coal & Dock Co. v. Bassett, 309 U. S. 251, 60 S. Ct. 544, 84 L. Ed. 732." (Emphasis ours.)

The holding of the Court below is in direct conflict with the view taken by this Court in *O'Rourke*, supra. Is not a reliance upon petitioner's work on other occasions, be it railroad work or work on other barges, for the purpose of showing a lack of permanency ignoring the test of the "injured worker's *particular* activity at the time of injury"? How can it be otherwise?

No case with the exception of *O'Rourke*, supra, has laid down the criteria for determining whether an employee, ordinarily and realistically a railroader, becomes entitled to compensation under the Longshoremen's and Harbor Workers' Compensation Act or retains the very same remedies that he would have under the Federal Employers' Liability Act by coming under the Jones Act. The test laid down by the Third Circuit in this case—viz. that there be a more or less permanent connection with the ship—has no place in these kind of cases. Or at least the meaning attributed to the "permanency test" in this case is erroneous. It is superficial and non-discerning.

Can there be any doubt that if the petitioner here rode *across* the Delaware River every day or three times a day *on different barges* for the same employer he would nonetheless have that degree of permanency required to make his status as a member of a crew or a longshoreman at least a question of fact for the jury? Indeed, Rusin [the bargeman in *Norton v. Warner Co.*, 137 F. 2d 57 (C. C. A. 3, 1943)] *worked on other barges.* That fact did not prevent the Court of Appeals and this Court from deciding *as a matter of law* that he was a "*member of the crew.*" How then can such fact logically be used to hold precisely the opposite conclusion—viz. that such an injured workman cannot be found by a jury to be a member of a crew?

It is submitted that the type of permanency required is not that type which excludes the injured party from working on other barges or indeed, from working on land part of the time, so long as he has regular maritime duties which are of such character as to allow a jury to find him a "member of the crew."

Viewed in this light there was ample evidence that the petitioner was permanently connected with the barges on which he worked. He worked on them every day. He never worked on any other companies' barges or ships in this area.

By "permanency" sometimes referred to is simply meant the following:

> **The work in question must be regular, routine and associated with the normal performance of the employee's duties in the maritime business of the employer.**

By way of illustration:

(1) If a carpenter in the car shops was called on once or even irregularly, to go on navigable waters to repair a barge becase the ship's carpenter was off duty or the ship had none, or

(2) If the cook who prepares the officers of Reading Company's luncheons daily was drafted to make lunch for the same group while on an inspection tour of the Company's barges, or

(3) A painter who normally paints cars in the yards is sent to paint a scratched side of a ferry of the defendant while docked for several hours at its Philadelphia slip.

These and a hundred more illustrations would demonstrate cases where clearly the maritime employment would not only be not permanent, but also so irregular and so unrelated to the vessel or vessels of the employer that clearly the employee could not possibly be treated as a "member of a crew."

Suppose, however, a pilot of the defendant's ferries, rode each one of its twenty ferries across the river in one day, never within any specific schedule or order, would he if injured be held not to have that degree of "permanent connection" with the vessel so that he would not be a "member of the crew"? Clearly not!

On the other hand, if the petitioner in addition to the duties he did perform also rode the cars across the river, he would clearly have been a "member of the crew." And this would be true if he rode thirty different floats a day across the river. Where then is the "*permanency*" on which *alone* the Court below relied to negate petitioner's rights under the Jones Act? "*Permanency*" *can not possibly be twisted into meaning* "*exclusively*" *or* "*singly*" *or* "*only.*" It's true connotation in these cases is "regularly", as part of his every day duties.

In *Wilkes, et al. v. Mississippi River Sand & Gravel Co.*, 202 F. 2d 383 (C. A. 6, 1953), the plaintiff was held a "member of the crew" though he worked on four different barges of the employer. It was here held that that fact did not affect his right to the protection afforded by the Jones Act.

It is this distortion of the meaning of "permanency" which led the Court of Appeals to the erroneous decision in this case.

We repeat, because it is important, the Court of Appeals decided *as a matter of law* that the petitioner was not a member of a crew. Certainly, there was ample evidence to justify the jury's verdict that the petitioner *had* the "more or less permanent connection" required.

Finally, if the result in this case is allowed to stand we find the law in this peculiar posture. Longshoremen have the remedies of the Longshoremen's and Harbor Workers' Compensation Act and the remedy of unseaworthiness. Seamen other than those who are also railroaders have the Jones Act (which is actually the Federal Employers' Liability Act) and the doctrine of unseaworthiness. But persons like O'Rourke and Zientek are deprived of the Federal Employers' Liability Act and the Jones Act and relegated to the Longshoremen's and Harbor Workers' Compensation Act. This down grading and deprivation of the employment of even that lower paid class of employees eloquently refutes the conclusion reached by the Court of Appeals below.

III. The Trial Court properly presented the issue to the jury which was "Was petitioner not a member of the crew at the time of the accident?"

Throughout this trial respondent's counsel repeatedly stated the issue to be whether the petitioner was a seaman or a longshoreman at the time of his accident. Thus at page 113a:

> "The next question, basically, is whether or not Mr. Zientek is a seaman and was a seaman at the time of this accident. Now, you may say, how does that have any significance, why is that important, whether we call him a seaman or something else."

and also said on page 114a:

> "* * * that is an Act that protects seamen, and in order to recover, under the Jones Act, the man must show, first of all, that he is a seaman, * * * if he can show he was a seaman he is entitled to recover under the Jones Act provided he can show we were careless, or he was injured by a safety appliance device."

and also said on page 115a:

> "* * * That is the real issue in this case, is Mr. Zientek a seaman within the meaning of the law?"

and also said on page 118a:

> "* * * In order to recover under the Jones Act you must conclude that he was a seaman."

He said the same thing in his summation at page 250a, where he said:

> "So, that is why the basic issue in this case is, was Mr. Zientek a seaman? * * * We see now that one of

> the questions in this case is whether or not Mr. Zientek is a seaman, and the reason why that is important is, if he is not a seaman he recovers under the Longshoremen's Act regardless of whether he was careless or injured by a defective brake. Whereas, if he is a seaman he can recover under the Jones Act only if he was injured through the carelessness of the company."

and also said on page 244a:

> "* * * but finally we summed it all up at the end by saying that the basic issue in this case was whether or not Mr. Zientek at the time of this accident was a seaman. I proposed that was the basic issue and Mr. Richter said 'yes', and the Judge gave his approval, too, and that is the basic issue, for the reason I will mention in just a moment."

As a clincher, Mr. McConnell said at page 120a:

> "MR. McCONNELL: If Your Honor please, I think maybe we can settle all this.
>
> *"Mr. Richter, do you agree or don't you that the basic issue in this case is whether or not at the time of this accident Mr. Zientek was a seaman?"* (Emphasis ours.)

At no time in the trial did Mr. McConnell speak of the issue of whether the plaintiff was a member of the crew. But plaintiff prepared and the Court affirmed and charged the plaintiff's points 2, 3, 4, 5, 6, 8 and 13, each of which carefully delineated and emphasized the trial issue.

An examination of what counsel for the petitioner told the jury may be found beginning at page 225a. The jury was told about the character of work that each class of employee does; the amount of discretion placed in the particular employee; whether it has to do with navigation; whether it has anything to do with the welfare of the vessel; whether the employee is required to know and

understand the sea; whether there is any duty to check on the seaworthiness of the vessel; and what it is that a longshoreman does or does not do. The speech speaks for itself and this Court need not be burdened here by its repetition other than that it may read the same up to page 230a and determine whether in fact petitioner's counsel did not state the true issue.

Moreover, in the charge to the jury the Learned Trial Judge affirmed petitioner's request for charge numbers 2, 3, 4, 5, 6, 8 and 13 which pinpointed the crucial issue which was "Was the petitioner a member of the crew?" There was no conceivable basis for criticism of the method or manner in which this case was presented by petitioner's counsel to the jury.

It must be remembered that even this Court in *Warner v. Goltra*, 293 U. S. 155, 55 S. Ct. 46 (1934), said:

> "* * * verbal niceties were bent to the over-mastering purpose of the Act to give protection to workers injured upon ships * * *. In the construction of this chapter, every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the 'master' thereof; and every person who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman'; and the term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river * * *. *That definition itself is 'directed to extension not to restriction.'*" (Emphasis ours.)

In *Carumbo v. Cape Cod S. S. Co.*, 123 F. 2d 991, 995 (C. C. A. 1, 1941), the Court said:

> "The process of liberal construction of the Jones Act cannot now be ignored because Congress has seen fit to pass the Longshoremen's Act. As a result of the cases, *we feel constrained to hold that one who does any sort*

of work aboard a ship in navigation is a 'seaman' within the meaning of the Jones Act." (Emphasis ours.)

One case actually considers the specific issue of whether there is an absolute necessity for using the words "member of a crew." In the case of *Gahagan Const. Corporation v. Armao*, 165 F. 2d 301 (C. C. A. 1, 1948), the United States Court of Appeals for the First Circuit said at page 306:

> "Although perhaps it would have been preferable for the trial judge to use the term 'member of the crew' and then define it, *there is no magic in that phrase that absolutely requires its use in a charge.* The words are not such as to have any peculiar or particular significance to a jury. The judge would have to define the term in any event. If this definition was correct, there was no reversible error in failing to use the words themselves. A comparison of the judge's definition with the definition in Norton v. Warner Co., above set forth, shows that he used almost the same words there used. And his charge meets the test we laid down in the Carumbo case. We think it clear the jury in substance found that the plaintiff was a member of the crew, although it did not consider those exact words." (Emphasis ours.)

CONCLUSION.

The petitioner seeks merely to be protected in his right to trial by jury on this simple factual issue upon which there is an overabundance of individual facts which would support his contention that he was a "member of the crew." The Court of Appeals for the Third Circuit has decided this question as a matter of law. It has set up a clay pigeon, given it its own restrictive, narrow, artificial interpretation, and then measuring the petitioner's position as against it held that he could not be a "member of the crew."

No other case stands for the proposition enunciated by the Court below in this case. No other person in the petitioner's position has ever been denied his rights under the Jones Act.

We can well envision a veritable host of seamen who are members of a crew who will be deprived of their rights under an Act of Congress specifically written for their protection because other Courts may now follow this decision of the Court of Appeals for the Third Circuit as authority for this most extraordinary and bizarre proposition of law.

It is respectfully submitted, it must not be permitted to go unnoticed and unchecked. To do so is to undermine and emasculate this important humanitarian piece of legislation written for the benefit of seamen who are members of a crew and not for the benefit of the owners of the vessels.

Respectfully submitted,

B. NATHANIEL RICHTER,
RICHTER, LORD & FARAGE,
Attorneys for Petitioner.

APPENDIX.

UNITED STATES COURT OF APPEALS.

FOR THE THIRD CIRCUIT.

No. 11,381.

LEO A. ZIENTEK,

v.

READING COMPANY,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued December 10, 1954.

Before: McLAUGHLIN, KALODNER and HASTIE,
Circuit Judges.

OPINION OF THE COURT.

(Filed March 10, 1955)

By McLAUGHLIN, Circuit Judge.

The chief question here is whether there was substantial evidence on which the jury could reasonably find that plaintiff-appellee was "a master or member of a crew of any vessel." See McKie v. Diamond Marine Co., 204 F. 2d 132 (C. A. 5, 1953); Schantz v. American Dredging Co., 138 F. 2d 534 (C. A. 3, 1943); Carumbo v. Cape Cod S. S. Co., 123 F. 2d 991 (C. A. 1, 1941). If there was not, his exclusive remedy is under the Longshoremen's and Harbor Workers' Compensation Act,[1] Swanson v. Marra Bros., 328 U. S. 1 (1946), and this suit under the Jones Act[2] must be dismissed.[3]

Appellee was employed by appellant as a railroad brakeman. As part of his duties, he helped move box cars on to car floats in the Delaware River. Since he sustained the injury which is the basis for the action below while performing the latter duties, he cannot take advantage of the Federal Employers' Liability Act,[4] the normal railroader's remedy. Pennsylvania R. Co. v. O'Rourke, 344 U. S. 334 (1953).[5]

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[1] 33 U. S. C. Sec. 901 et seq. (1952).

[2] 46 U. S. C. Sec. 688 (1952).

[3] In some cases a third possibility might be found in a state compensation statute. For a recent discussion on these alternatives, see Rodes, Workmen's Compensation For Maritime Employees: Obscurity In The Twilight Zone, 68 Harv. L. R. 637 (1955).

[4] 45 U. S. C. Sec. 51 et seq. (1952).

[5] That case, which involved facts similar to the one before us, was brought under the Federal Employers' Liability Act. The Supreme Court in holding that Act inapplicable stated that "The Longshoremen's and Harbor Workers' Act applies." The applicability of the Jones Act, however, was apparently not litigated.

The jury found that appellee was a master or member of a crew of a vessel. If the facts, which are largely undisputed, support this finding or if different conclusions can reasonably be drawn from such facts, the jury's finding must stand. South Chicago Coal & Dock Co. v. Bassett, 309 U. S. 251 (1940); Gahagan Const. Corporation v. Armao, 165 F. 2d 301, 305 (C. A. 1, 1948).

The standards by which the courts have determined whether or not a person comes within the statutory definition are (1) that the ship be in navigation, (2) that there be a more or less permanent connection with the ship, and (3) that the worker be aboard primarily to aid in navigation. McKie v. Diamond Marine Co., supra at 136; Gahagan Const. Corporation v. Armao, supra at 305; Carumbo v. Cape Cod S. S. Co., supra at 995; Wilkes v. Mississippi River Sand & Gravel Co., 202 F. 2d 383, 388 (C. A. 6, 1953), certiorari denied 346 U. S. 817 (1953).

The car float upon which appellee was injured was being loaded at the dock and appellee never remained on the float when it crossed the Delaware. Nevertheless it was being readied for river travel and must be considered to have been in navigation. Daffin v. Pape, 170 F. 2d 622, 624 (C. A. 5, 1948); cf. Desper v. Starved Rock Ferry Co., 342 U. S. 187 (1952).

But did appellee have a more or less permanent connection with the car float upon which he was injured? We think not. There were twenty or twenty-two floats involved in the box car loading operation. Appellee did not load one particular barge but loaded whatever float happened to be in the slip at the time. In fact, appellee testified that he thought he had been injured upon barge #12 but he was not positive. His counsel, however, stipulated that it was barge #14. He obviously did not have any permanent connection with any particular float.

His position is more like the employee in Gonzalez v. Riverside & Fort Lee Ferry Co., 43 F. Supp. 366 (S. D. N. Y., 1942), who readied three different ferry boats for operation

in the Hudson River, the stevedore in Rackus v. Moore-McCormack Lines, 85 F. Supp. 185 (E. D. Pa., 1949) who loaded and unloaded various ships, and the member of a "shore gang" in Kraft v. A. H. Bull S. S. Co., 28 F. Supp. 437 (S. D. N. Y., 1939) who worked on board ships cleaning their holds and getting them ready for cargo. In all three cases the employee in question was held not to be a member of a crew of any vessel. See also Swanson v. Marra Brothers, supra; Reyes v. A. H. Bull S. S. Co., 80 F. Supp. 223 (S. D. N. Y., 1948); Mamat v. United Fruit Co., 39 F. Supp. 103 (S. D. N. Y., 1940).

Various definitions of the word "crew" have been put forth in the cases. It has been said that it is used "to connote a company of seamen belonging to the vessel, usually including the officers. It is the 'ship's company.'" Seneca Washed Gravel Corporation v. McManigal, 65 F. 2d 779, 780 (C. A. 2, 1933). In Maryland Casualty Co. v. Lawson, 94 F. 2d 190 at 192 (C. A. 5, 1938), the Court of Appeals for the Fifth Circuit said:

> "There is implied a definite and permanent connection with the vessel, an obligation to forward her enterprise and to protect her in emergency, and a right to look to her and her earnings for wages. If she has a master, there is subjection to his commands. The nature of the work done is not determinative. Engineers and cooks as well as sailors are included. Longshoremen who load and unload a vessel under temporary local employment do not become members of the crew, nor do mechanics who similarly come aboard her to repair or clean or paint her: nor do those permanently employed upon her cease to be members of the crew because they are put at the same sort of work."[6]

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[6] South Chicago Coal & Dock Co. v. Bassett, supra, which the Supreme Court decided because of an alleged conflict with this decision, in no way impinges upon the validity of this definition.

Appellee does not come within these definitions and there were no facts in evidence from which the jury could reasonably conclude that he did.[7]

As Judge Rifkind said in Gonzalez v. Riverside & Fort Lee Ferry Co., supra, at 367:

> "The fact that in this instance libellant believes he might have a larger recovery under the Jones Act does not justify a narrowing of the Longshoremen's Act so as to exclude from its evident advantages members of the class of employees whom Congress intended to benefit."

Since there was no evidence upon which a jury could have found that appellee was a crew member of any vessel the judgment below will be reversed with directions to dismiss the action.[8]

A true copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

---

[7] Whether appellee's duties were primarily in aid of navigation we therefore need not now decide. Compare however South Chicago Coal & Dock Co. v. Bassett, supra; Kanisher v. Irwin Operating Co., 215 F. 2d 300 (C. A. 5, 1954); Merritt-Chapman & Scott Corp. v. Willard, 189 F. 2d 791 (C. A. 2, 1951); William Spencer & Son Corp. v. Lowe, 152 F. 2d 847 (C. A. 2, 1945), cert. den. 328 U. S. 837 (1945); Diomede v. Lowe, 87 F. 2d 296 (C. A. 2, 1937), cert. den. 301 U. S. 682 (1936); with Norton v. Warner Co., 321 U. S. 565 (1944); Summerlin v. Massman Construction Co., 199 F. 2d 715 (C. A. 4, 1952); Tucker v. Branhan, 151 F. 2d 96 (C. A. 3, 1945); Schantz v. American Dredging Co., supra.

[8] While the above disposes of the appeal, comment is necessary upon the manner in which this suit was presented to the jury by plaintiff's attorney. He gave that body as the legal question in the case—whether the plaintiff was a seaman or longshoreman—when actually as has been stated the true problem was whether, under the Longshoremen's Act definition, plaintiff was a "master or member of a crew of any vessel." He claimed improperly to the jury that the plaintiff was "speaking for all American railroaders." His conduct otherwise was much the same as that detailed in Straub v. Reading Company, F. 2d , decided today by this court. See also Heriegel v. Reading Company, F. 2d , also decided today by the court.

6/22

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JUN 30 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955 Number 120

LEO A. ZIENTEK,
Petitioner,

v.

READING COMPANY,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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JUNE 30, 1955

PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA

INDEX

	PAGE
REFERENCE TO OPINION BELOW	1
STATEMENT AS TO JURISDICTION	2
STATUTES INVOLVED	2
QUESTION PRESENTED FOR REVIEW	4
STATEMENT OF THE CASE	5
1. Summary	5
2. Procedural History of the Case	5
3. The Facts	8
SUMMARY OF THE ARGUMENT	17
ARGUMENT	18
1. There is no Conflict in Decision or Principle	18
2. No Important Question of Federal Law is Involved	22
3. The Decision Below is Clearly Correct	23
(a) The Petitioner's Characterization of the Subject Decision is Unjustified	23
(b) The Applicable Law	26
CONCLUSION	39
The Petition for Writ of Certiorari Should be Denied	39

Table of Cases Cited

PAGE

The Bound Brook, 146 Fed. 160 (D. C. Mass., 1906) 20

Braner *v.* Brooklyn Eastern District Terminal, 46 F. Supp. 302 (E. D. N. Y., 1942) 32

Carumbo *v.* Cape Cod S. S. Co., 123 F. 2d 991 (C. C. A. 1st., 1941) 22, 38

Gahagan Const. Corporation *v.* Armao, 165 F. 2d 301 (C. C. A. 1st., 1948) .. 22

Gonzales *v.* Riverside & Fort Lee Ferry Co., 43 F. Supp. 366 (S. D. N. Y., 1942) 22, 36

Kraft *v.* A. H. Bull S. S. Co., 28 F. Supp. 437 (S. D. N. Y., 1939) 22, 34

Mamat *v.* United Fruit Co., 39 F. Supp. 103 (S. D. N. Y., 1940) 22

McKie *v.* Diamond Marine Co., 204 F. 2d 132 (C. A. 5, 1953) 22

Norton *v.* Warner Co., 137 F. 2d 57 (C. C. A. 3d, 1943), aff'd 321 U. S. 565, 64 S. Ct. 747 (1944) 21

O'Rourke *v.* Pennsylvania Railroad, 344 U. S. 334, 73 S. Ct. 302 (1953) .. 7, 22, 25, 27

Posavec *v.* Merritt-Chapman & Scott Corp., *et al.*, 106 F. Supp. 170 (S. D. N. Y. 1952) 38

Rackus *v.* Moore-McCormack Lines, 85 F. Supp. 185 (E. D. Pa., 1949) ... 22, 37

Reyes *v.* A. H. Bull S. S. Co., 80 F. Supp. 223 (S. D. N. Y., 1948) 22

South Chicago Coal & Dock Co. *v.* Bassett, 309 U. S. 251, 60 S. Ct. 544 (1940) 19, 31, 35

Straub *v.* Reading Company, 220 F. 2d 177 (C. A. 3, 1955) 8

Swanson *v.* Marra Brothers, 328 U. S. 1, 60 S. Ct. 869 (1946) 22

Tucker *v.* Branham, 151 F. 2d 96 (C. C. A. 3d, 1945) 21

United States Lighterage Corp. *v.* Hoey, 142 F. 2d 484 (C. C. A. 2d, 1944) .. 21

Warner *v.* Goltra, 293 U. S. 155, 55 S. Ct. 46 (1934) 20

Wilkes *v.* Mississippi Sand & Gravel Co., 202 F. 2d 383 (C. A. 6, 1953), certiorari denied, 346 U. S. 817 (1953) 20, 22

Table of Statutes Cited

Jones Act, 46 U. S. C. A. § 688 ..... 2, 4, 5, 7, 22, 26, 32, 34, 36, 38

Longshoremen's and Harbor Workers' Compensation Act 33 U. S. C. A. § 902, *et seq.* 2, 3, 7, 9, 19, 21, 22, 23, 27, 28, 30, 31, 32, 34, 35, 36, 38, 39

In the Supreme Court of the United States

October Term, 1955. Number 120.

Leo A. Zientek,
Petitioner

v

Reading Company,
Respondent

Upon Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

RESPONDENT'S BRIEF IN OPPOSITION.

REFERENCE TO OPINION BELOW.

The unanimous opinion of the Court of Appeals directing the dismissal of plaintiff-petitioner's action appears at 220 F. 2d 183, *et seq.* (1955) and at page 45 *et seq.* of the Petition for Writ of Certiorari in these proceedings.

The District Court rendered no opinion in this case.

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was filed on March 10, 1955 (Petition for Writ, p. 45).

The jurisdiction of this Court is invoked by Petitioner under c. 646, Act of June 25, 1948, 62 Stat. 928, 28 U. S. C. § 1254(1).

STATUTES INVOLVED.

There are only two statutes directly involved in this case, namely, the Jones Act and the Longshoremen's and Harbor Workers' Compensation Act, the pertinent provisions of which are as follows:

Jones Act, Title 46 U. S. C. A.:

"§ *688. Recovery for Injury to or Death of Seaman.*

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; * * * Mar. 4, 1915, c. 153 § 20, 38 Stat. 1185; Jun. 5, 1920, c. 250 § 33, 41 Stat. 1007.

Longshoremen's and Harbor Workers' Compensation Act, Title 33 U. S. C. A.:

§ 902 *Definitions.* When used in this chapter—

* * * * * * *

(3) The term "employee" does not include a master or member of a crew of any vessel * * *.

(4) The term "employer" means an employer any of whose employees are employed in maritime employment in whole or in part upon the navigable waters of the United States • • •.

§ 903 *Coverage.* (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States • • •. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel • • •

§ 904 *Liability for Compensation.*

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908 and 909 of this chapter • • •

§ 905 *Exclusiveness of Liability. The liability of an employer prescribed in § 904 of this chapter shall be exclusive and in place of all other liability of such employer to the employee* • • • (Emphasis added). March 4, 1927, c. 509, § 2 *et seq.*, 44 Stat. 1425 *et seq.*

QUESTION PRESENTED FOR REVIEW.

In a suit under the Jones Act where plaintiff-petitioner's undisputed evidence was that he was injured while employed by defendant-respondent as a railroad brakeman in an ordinary five-man train crew while tightening a brake on a box car on a car float, did the Court of Appeals err in deciding that plaintiff had not produced evidence from which a jury could reasonably find that he was a member of a crew of a vessel?

STATEMENT OF THE CASE.

1. Summary.

Plaintiff-petitioner brought suit for personal injury against his railroad employer, the respondent, under the Jones Act. His undisputed evidence established that he was injured while employed as a railroad brakeman in an ordinary five-man train crew while tightening a brake on a box car on a car float. He testified that he had no connection with that float save insofar as he might have occasionally moved cars on or off it and he did not know which particular float it was. The float was handled by its own crew of which he was not a member. He took all his orders from his conductor. He argued, however, that that fraction of his brakeman's work, ten per cent, which involved moving freight cars on and off various car floats, constituted him a "member of a crew of a vessel" within the meaning of the Jones Act.

The Court of Appeals reviewed the undisputed facts of record and decided unanimously that those facts did not constitute evidence from which a jury could reasonably find that plaintiff-petitioner was a member of a crew of any vessel.

Petitioner now petitions for a review of that decision by writ of certiorari. Defendant respectfully presents this Brief in Opposition to demonstrate why that decision was correct and why certiorari should not be granted.

2. Procedural History of the Case.

On May 9, 1949, plaintiff filed his complaint (1a) in the United States District Court for the Eastern District of Pennsylvania, claiming a cause of action under the Federal Employers' Liability Act, the Safety Appliance Acts, the Jones Act and under general admiralty law (4a *et seq.*).

On August 1, 1949, defendant moved to dismiss plaintiff's complaint upon the ground that at the time of the

accident plaintiff was employed by defendant as a railroad brakeman and that the injuries with respect to which he brought suit were received while he was tightening a brake on a box car on a car float, wherefore defendant's sole liability to plaintiff was under the Longshoremen's and Harbor Workers' Compensation Act (6a).

On August 19, 1949, depositions of plaintiff and three other members of his train crew were taken wherein plaintiff testified at length as to his duties and the nature of his employment (19a *et seq.*), claiming he did railroad work exclusively.

On September 28, 1950, the Hon. George A. Welsh, *J.*, denied defendant's motion to dismiss plaintiff's claim under the Federal Employers' Liability Act in an opinion which held:

> The facts in the record clearly establish that the plaintiff in the instant case is not a longshoreman or a stevedore and that he is a railroad worker in the occupational sense. He was employed by the defendant railroad as a brakeman and his duties consisted of coupling and uncoupling cars, setting and releasing brakes, checking the equipment and passing signals. He performed 90 per cent of his work on land and the remaining 10 per cent aboard a car float in navigable waters. However, whether he worked on land or on navigable waters his work was always that of a "railroader" (as described above) and never that of a longshoreman or stevedore (8a, 9a).
>
> * * * * * * *
>
> The plaintiff, it has already been seen, was a "railroader" in the operational sense. He performed only railroad work and he performed said railroad work 90 per cent of the time on land and 10 per cent of the time on a car float in navigable waters. (10a)

At the same time and upon the same reasoning the learned Court in the same opinion dismissed plaintiff's claim under the Jones Act and general admirality jurisdiction (12a).

Defendant consequently filed an answer. However, on January 12, 1953, this Honorable Court decided the case of *O'Rourke* v. *Pennsylvania Railroad,* 344 U. S. 334 (1953), wherein plaintiff brakeman brought suit under the F. E. L. A. for injuries received upon a car float. The Supreme Court held that since the accident happened on navigable waters, the maritime law of the United States applied, and therefore plaintiff was covered by § 903a of the Longshoremen's Act (at 338) and that the defendant's liability under that act was exclusive (at 340). This opinion concluded:

> "The Longshoremen's and Harbor Workers' Compensation Act applies." (page 342).

Defendant Reading Company consequently renewed its motion to dismiss and by opinion filed June 16, 1953, (17a) the Hon. George A. Welsh, *J.*, holding that he was bound by the *O'Rourke* decision, dismissed plaintiff's claim under the F. E. L. A. *but reinstated plaintiff's claim under the Jones Act.*

Over the protest of defendant which filed motion for directed verdict (295a), the case proceeded to trial before Judge Welsh beginning on April 29, 1954 and ending on May 5, 1954, upon the issue of whether plaintiff was a "seaman", a member of a crew of a vessel, or a "longshoreman."

The jury returned a verdict in favor of plaintiff in the amount of $15,000.

Defendant filed motions for judgment *n.o.v.* and new trial which were dismissed by the Trial Judge without argument by proceedings appearing at 298a *et seq.*

Defendant then appealed to the Court of Appeals for the Third Circuit asking for judgment *n.o.v.*, or, if judg-

ment were refused, for new trial upon the ground that the conduct of counsel for plaintiff at trial had in effect denied defendant a fair trial.

The Court of Appeals, after consideration of record, briefs and argument, unanimously awarded defendant judgment *n.o.v.* by opinion of March 11, 1955, appearing at page 45 *et seq.* of the Petition for Writ of Certiorari in these proceedings. At the same time the Court of Appeals stated in a footnote to that opinion, which footnote appears upon page 48 of the Petition for Writ of Certiorari, that while its decision disposed of the appeal, it was necessary to comment upon the conduct of counsel for plaintiff which was much the same as in the case of *Straub* v. *Reading Company,* 220 F. 2d 177 (1955) decided by that Court the same day. In the *Straub* case defendant was awarded a new trial by virtue of said conduct of counsel for plaintiff.

With respect to the above decision of the Court of Appeals entering judgment in favor of defendant, plaintiff petitioner now seeks Writ of Certiorari.

This Brief in Opposition is respectfully filed to demonstrate why that Petition for Writ of Certiorari should be denied.

3. The Facts.

This Honorable Court will observe that as is shown by the foregoing procedural history of this case and also by the evidence which follows, the plaintiff himself claimed that he was a railroader and only a railroader both as to his work on land and his work on the car float and that the learned District Court Judge specifically so found (8a, 9a, 10a).

There were no issues of fact in this case. The facts were not in dispute.

The agreed facts, which were put into evidence by the plaintiff himself, were as follows:*

* The facts hereinafter stated are taken almost verbatim from the record.

Plaintiff Zientek by his own testimony was a brakeman (20a).

On November 26, 1948 (19a), the plaintiff testified, he was acting as a brakeman (20a) on a regular train crew (20a) in the Port Richmond yard of defendant. This crew consisted of the engineer, Barkley Borden (20a), the engineer's helper, William Thomas, Jr. (20a), conductor, Leonard McFadden (21a) and another brakeman, William Peightel (21a).

The engine with which the plaintiff brakeman was working was a Diesel yard shifter (21a) and at the time the accident happened, the engine was headed away from the Delaware river and was attached to five cars (21a). It was on the south track at slip No. 3 (22a).

Just before the accident happened, plaintiff testified, he had been working on the ground (22a). His engine and its cars then began to shove the eastern-most car on to a float tied up upon the Delaware river (34a) at that slip (22a, 23a). The plaintiff then walked on to the float and as the cars were backed on to the float he gave a stop signal (23a). He then climbed up on the ladder of the car to the roof of the car and thence climbed down to the brake step of the car and applied the brake (24a). It was a staff brake (25a). When he started to apply the brake, he first tried the brake, holding the brake club in his left hand, and holding on to the wheel with his right hand (24a). With his left foot against the dog he applied pressure to put the brake on (24a). He was thus pushing when suddenly there was a jerk and the brake slipped, he said (24a). He tried to hold on and couldn't and it threw him down on to the deck of the float (24a). This was the fall which resulted in his injury.

The car involved, the plaintiff said, was a New York Central Box Car (27a).

Thereafter the plaintiff received compensation under the Longshoremen's and Harbor Workers' Act (32a).

The plaintiff further testified that several months before this accident he was assigned to what is called "the float job", a train crew which works more or less on the river-front but whose work "is mostly on the ground" (33a). According to the plaintiff, "at least 90% of" his work was on the ground in terms of time (33a). While working on the ground, he would proceed as follows (33a):

After he unloaded a float, he had to take the cars so unloaded from the float slips back to Clearfield Street (33a). At "C" Street he would generally back them off the track at any available space and then go back to 9-B track to take the cars down to the float slips and to load the floats again (33a).

It was not plaintiff's job, he said, to take the floats across the river (33a). He never went across the river at all (34a). The defendant had a special float crew to take the cars across the river (34a), plaintiff said.

The plaintiff played no part in taking the floats across the river or bringing it back. All he does is load and unload it (34a).

In response to questioning by counsel for plaintiff, Barkley G. Borden, the engineman, confirmed the above mentioned testimony of plaintiff. He particularly testified in answer to questions of counsel for plaintiff that there was no difference between the work that a trainman does in picking up and pulling a car or uncoupling a car at Clearfield Street and the same work on a float (42a). It was the same coupling movement (42a). He was doing brakeman's work (42a) coupling and uncoupling cars (42a), setting brakes and releasing brakes (42a) and checking the equipment (42a). And that is the same work whether it was done on a float or on solid ground (42a).

Conductor McFadden also testified to the same effect in answer to questions by counsel for plaintiff.

He testified for example that his crew was a team (52a), that his actual work on the float consisted of moving a car on or moving it off (53a). That that was a regular routine of work; "loading and unloading car floats" (53a). By that he meant taking the cars off the floats and putting the cars back on the floats (53a).

Their duties were all those of brakeman or conductor. They cut and couple cars, they release and set brakes, they use the same kind of signals, they work under the same operating books as the yard crews do (54a), they do not have to make any study of maritime law or maritime operations (54a). He is not a member of any seamen's organization or longshoremen's organization (54a). He was a member of the Brotherhood of Railroad Trainmen (54a). He considered himself a trainman (54a). There was no difference in the work that they did between spotting a car on a float and spotting a car along an industrial siding (54a, 55a).

At this juncture in the testimony, counsel for plaintiff asked counsel for defendant in effect to agree that Zientek was a railroader and spent the greatest portion of his time as a railroader (59a). Counsel for defendant agreed that he was a railroader in the common sense of the word (59a) and in the usual sense of the word (59a).

Counsel for plaintiff then asked if defendant would agree that Zientek and his crew did not do any longshoremen's work in the sense that they have anything to do with tying up boats or any marine work tying up the float or in any way lining up the tracks between the float and the slip, loading or unloading any of the cars (60a). Defendant so agreed (50a).

At the time of the accident everyone in the train crew except Zientek was on the ground (62a).

William S. Pightel testified in depositions in answer to questions by counsel for plaintiff that he was the other brakeman in this crew; that it was important to put brakes on the cars when they were placed on the float so that the

cars would not roll off (66a); that he never did any marine work as a member of this crew (66a); that he never loaded or unloaded any of these cars; that everything he does is regular brakeman's work (66a), cutting and coupling cars (66a), passing signals according to the ground rules (66a); and that at the time of this accident the entire crew was on the ground except Zientek (66a) and that Zientek was on the float just to put the brake on the car that was left on the float (66a) and was to join the rest of the crew on the ground again thereafter (66a, 67a).

Plaintiff Zientek himself again testified in depositions that at the time of this accident he was employed as what is ordinarily called a brakeman (68a) and that at the time of the accident he had never heard anyone call it anything else (69a).

The plaintiff also testified that when they first went to a float they looked to see whether the float was tied securely to the slip (71a) although it wasn't part of his work to look for leaks in the float (71a). They did look to see whether the lines were tied, the pins were in, the chains were hooked-up and whether there was anything wrong with the track that might cause the cars to be derailed (71a). This was typical of what he does whenever he goes to move a car at any place (71a). In other words, he was trying to see if he could pull these cars off the float safely (71a). When they had decided that, they would then couple up on the float (71a) and he would climb up on top of the cars and release the brakes (71a). He would walk off the float then (72a). He would then go along with the cars (72a) up to Clearfield Street (72a). He would do the ordinary work that the brakeman did off the float (72a). He never sailed on the river on the float (73a), he never slept on the float (73a), there were no sleeping quarters on the float (73a), he never slept on any of the tugboats (73a), he never got his meals on the float (73a), he never got his meals on any of the

tugboats (73a), he had no ordinary seaman's license from the Bureau of Steamboat Inspection (73a), he never had any other license from any other agency of the United States Government for regulating navigable vessels (73a), he never signed any ship's articles (73a, 74a).

Plaintiff also testified that his activities of loading and unloading related not to any one particular float but it took in all the floats of Reading Company (74a), that is, whatever floats came into these slips at Port Richmond (74a).

The various floats were moved in and out, plaintiff said, by tugboats (75a), not always by the same tugboat though. There were a number of tugboats (75a, 76a). He had no duties with respect to the tugboats (76a). He was not a member of a crew of the tugboat (76a). He had no occasion to make trips on the river on the tugboats (76a) or on the floats (76a). There were four slips in operation at all times (77a).

Subsequently, during the course of the trial, the plaintiff testified that he spent about 90% of his time on the land (126a) and 10% on the water (126a); that he was hired on as a brakeman on railroad cars (122); that he received training and instruction in how to handle railroad cars, how to set brakes, make couplings and do all the things that railroad brakemen usually do (122a); that he works in railroad yards (122a); that he is in the yard mostly (122a); that his present job at the time of trial was braking (126a).

The plaintiff further testified at trial that the day in question he put his cars first on the south track of the slip and that was where the accident happened (133a). He brought the cars back to the center of the float and he gave the signal to back them (133a). He also gave the signal to stop (133a). Then, after the conductor had made the cut and placed a chock under their wheels (133a), he climbed up on top of the car (134a).

He never crossed the Delaware with the floats (134a). After placing the car on the float, he would go about the work of loading other floats and placing cars on other floats (134a). The rest of his work is ashore, but the vessel goes across the river either to Camden, N. J., or to another point on the Philadelphia side (134a). The floats are taken across by diesel tugs and carry a deck hand on each float (135a). These tugs take the car floats down the river to Catherine Street or Chestnut Street and they are placed in a slip or a dock just like the one where they come from (135a).

On the night of the accident the plaintiff performed all these loading operations, he said, putting the cars on the float (135a). The plaintiff then boarded the car in order to set the brake (137a). It was while he was attempting to set the brake, he said, that the accident happened (142a).

Subsequently the plaintiff said that during the 90% of his time that he spent on land (149a), he spent in uncoupling cars, putting on brakes, coupling cars, taking off brakes, coupling air hoses, passing signals, receiving signals and doing the work of a brakeman generally (149a). He also testified that he was classified as a brakeman by his employer, received brakeman's pay, belonged to the Brakemen's Brotherhood, did not belong to the maritime union but belonged to a union of railroad men (150a).

The plaintiff added that at the time of the accident he moved these cars on to the float, then went up the car (150a). Presumably, he said, he found the brake on (151a). He put his brake club through the spokes (152a) and in order to get it tight he pushed on the brake club with his left hand and pulled the wheel with his right hand (152a). While he was doing this the brake club slipped and the wheel surged forward and his accident occurred (152a).

These floats go across the river and sometimes down the river (162a). Plaintiff testified that he never made

any trips on the float but that these floats were taken by tugboats (162a).

The tugboat comes alongside and puts its lines on the float and makes the float fast to the tug (162a). A deck hand from the tugboat goes over on to the float (162a) and that is the way they take the float out across the river (162a). Plaintiff never had anything to do with that (163a). He didn't have any kind of a seaman's license from any organization (163a). He never took his meals on the float (163a), he never slept on the float, he never took his meals on the tug, he never slept on the tug (163a).

There were 20 or 22 different car floats in use (163a). Plaintiff was not positive which one he was on at the time the accident happened; it could have been number 12 or it could have been some other one (163a).* His activities are not confined to this one float (163a). He put cars on and does all the other things on whatever float happens to be in the slip at the time (163a)—whichever one is down there when he gets down there. He puts cars on (163a) or takes them off (163a) whichever one happens to be there (164a).

There is a man who works at this place who is called a sliptender, plaintiff said (164a), whose duties are to tend the slip (164a) and if the lines are to be tightened it is part of his work to tighten them (164a). Also, whenever it was time to take cars on or off any particular track whether on the float or on the ground, it was part of plaintiff's duty to check and see that there isn't anything on the track that might derail the car (164a).

All the time plaintiff was employed by the railroad and at the time of this accident he worked in a train crew of about five men (164a). He nearly always worked with the same five men (164a). He frequently worked with the same engine (165a), a diesel engine (165a).

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*His counsel subsequently stipulated that it was No. 14 (221a).

Mr. McFadden was the conductor in charge of the train crew (165a). He was Zientek's superior (165a). The plaintiff took his directions from him (165a).

Every night when plaintiff went to work, conductor McFadden would go somewhere to get directions for what he was to do that night (165a). He would go up and see the wharfmaster and the wharfmaster would tell him what to do—which cars to pull off and which to put on, and then he would go around to the yardmaster's office (165a). Then they'd get the yardmaster's orders (165a, 166a). He would come out and tell them whatever part of those orders fell to their work (165a) and what they were to do (165a).

Plaintiff concluded by testifying that during the 10% of his time he spent on the water he spent it putting on brakes, taking off brakes, coupling up air hoses when necessary, occasionally uncoupling air hoses, passing signals and receiving signals to and from other members of the crew (166a). Of course if he happened to come to a float that was listing, he wouldn't put any cars on it (166a). Or if the tracks on the float didn't quite meet the tracks on the bridge, he wouldn't try to put cars on the float in that condition (167a). Or if he found that the tide had loosened the lines he wouldn't try to put cars on it in that condition (167a) and if he went down with some cars loaded with steel and some empty cars, he wouldn't put all the steel cars on one side of the float and the empty cars on the other one (167a), but of the 10% of the time that he spent on the water he spent doing all those things such as putting on brakes, taking off brakes, passing signals, receiving signals, all through this time (167a).

At the time of the accident itself, just at that very time, he was putting on a brake (167a).

SUMMARY OF ARGUMENT.

This petition for writ of certiorari should be denied because:

1. *The decision of the Court of Appeals is not in conflict with any other decision or principle of law.*

A reading of that opinion will disclose that in rendering the instant decision the Court of Appeals simply considered whether or not the plaintiff had presented sufficient evidence to sustain the jury's verdict that he was "a member of a crew of a vessel". It accepted without question the rules of prior decisions as to the meaning of that phrase and in the light thereof concluded that plaintiff's evidence fell short of the necessary minimum.

Moreover, the subject opinion not only accepts without question the principles of prior cases, including those cited in the Petition for Writ of Certiorari, but in its application thereof to the factual situation of this case, properly follows the precedent set by those and other cases as will be demonstrated more fully below.

2. *No important question of Federal Law is involved in this case.*

As a reading of the opinion of the Court of Appeals will disclose, no question of law was involved in this case. The only question presented to the Court of Appeals was whether or not the plaintiff's own evidence, all taken as true, constituted evidence from which reasonable men could find that the plaintiff was "a member of a crew of a vessel" as that phrase has heretofore been defined by decisions of this and other Federal Courts. In considering that question the Court of Appeals reviewed the prior relevant decisions of this and other Federal Courts and, accepting all their principles as established, concluded that under the tests laid down in those decisions, this plaintiff had failed to present sufficient evidence that he was a member of a crew of any vessel.

3. *The decision of the Circuit Court of Appeals was clearly correct.*

The plaintiff's own uncontested evidence established that at the time of the accident he was not a member of a crew of a vessel but a railroad brakeman engaged in tightening a brake on a boxcar. Although plaintiff petitioner argues that his work of sometimes moving freight cars on and off floats and his duties incident thereto constitute him a "member of a crew" within the meaning of the Longshoremen's and Harbor Workers' Compensation Act, this Court has long since declared that it was the particular intention of Congress to include within the provisions of the Longshoremen's Act those engaged in the loading and unloading of vessels as was the plaintiff brakeman. Further, this and other Federal Courts have also consistently held that these persons whose duties are chiefly the loading and unloading of a vessel, as plaintiff's here, and particularly those who, like this plaintiff, have no more or less permanent connection with the vessel, are not "members of a crew."

ARGUMENT.

The Petition for Writ of Certiorari in this case should be denied because:

1. No Conflict in Decision or Principle is Involved in This Case.

A reading of the opinion of the Court of Appeals, which appears at page 45 *et seq.* of the Petition for Writ of Certiorari in these proceedings, will disclose that the only question involved in this case before the Court of Appeals was whether or not the plaintiff had presented sufficient evidence from which a jury could reasonably find that the plaintiff was a "member of a crew of a

vessel'' within the meaning of the Longshoremen's and Harbor Workers' Compensation Act as that phrase has been defined by prior decisions of this and other Federal Courts. This opinion also makes evident that in order to decide that question the Court of Appeals reviewed relevant prior decisions of this and other Courts and, in the light of the principles they laid down, which it accepted as established, concluded that on the basis of this plaintiff's evidence that at the time of the accident he was a railroad brakeman engaged in tightening the brake on a freight car, he had not produced evidence from which reasonable persons could conclude that he was a member of a crew of a vessel.

Petitioner has asserted at page 11 of his Petition for Writ of Certiorari that the subject decision is in conflict with the decision of this Court in *South Chicago Coal & Dock Co.* v. *Bassett,* 309 U. S. 251, 60 S. Ct. 544 (1940) and certain other cases listed in that paragraph of the Petition. A reading of those opinions discloses however that, with the exception of two which have no discernible bearing whatever on this case, all of them lay down the principles which the Court of Appeals invoked and applied to the plaintiff's evidence in these proceedings.

For example, in the *South Chicago Coal & Dock Co.* v. *Bassett,* 309 U. S. 251, 60 S. Ct. 544 (1940), this Honorable Court held that a decedent who had been employed aboard a coal lighter to facilitate the flow of coal from the lighter to the vessel being fueled and who did not work while the boat was *en route* from the dock to the vessel being fueled and had no duties on board the boat while it was in motion and who was paid an hourly wage and slept at home and boarded off the ship, was not a member of a crew of a vessel. Not only is the decision of the Court of Appeals in this case in accordance with that precedent, but the rules laid down by this Court in that decision are particularly appropriate here. In that case at pages 256 and 257 this Court stated that "It is

clear that Congress in finally adopting the phrase 'a master or a member of a crew' in making its exception intended to leave entitled to compensation all those various sorts of longshoremen and harbor workers who were performing labor on a vessel and to whom state compensation statutes were inapplicable." It is precisely that principle which is pertinent in this case and in accord with which the Court of Appeals rendered this decision.

Plaintiff has also asserted at page 11 of his Petition that the decision of the Court of Appeals in this case is in conflict with the case of *Warner* v. *Goltra,* 293 U. S. 155, 55 S. Ct. 46 (1934). That case held however that a master of a vessel is a seaman within the meaning of the Merchant Marine Act and has no discernible relation to this decision whatever.

Petitioner has also asserted at page 11 of his Petition that the decision of the Court of Appeals in this case is in conflict with *The Bound Brook,* 146 Fed. 160 (D.C. Mass., 1906). Since that case dealt with a wage dispute between German merchant seamen and their German vessel and the application of a treaty between the United States and Germany to that particular set of facts, no relationship between that case and this is to be found.

Petitioner has also asserted that the subject decision of the Court of Appeals is in conflict with the decision of *Wilkes, et al. v. Mississippi River Sand & Gravel Co.,* 202 F. 2nd 383 (C.A. 6, 1953). That case however involved one who lived on board the vessel and aided in its work, neither of which matters is true in this case. Also, that decision laid down the well-established general rule, that a member of a crew of a vessel is one who has a more or less permanent connection with a vessel in navigation and is on board primarily to aid in navigation—exactly the principles invoked by the Circuit Court of Appeals in this case.

Petitioner has also asserted at page 11 of his Petition that the decision of the Court of Appeals in this case

is in conflict with the decision of *Tucker* v. *Branham,* 151 F. 2nd 96 (C. C. A. 3d, 1945). In that case also, however, the subject employee lived on board the vessel and aided in its work and indeed was the only person ever associated with the work of the vessel. That case also lays down exactly the general rules considered and accepted by the Court of Appeals in this case.

Page 11 of the Petition for Writ of Certiorari also asserts that the decision of the Court of Appeals in the case of *United States Lighterage Corp.* v. *Hoey,* 142 F. 2nd 484 (C. C. A. 2d, 1944) is at variance with the decision of the Court of Appeals in this case but an examination of that decision will disclose that it relates to a barge captain who was in sole charge of the barge at all times. Incidentally, it further relates, not to whether or not the captain was a member of the crew of a vessel within the meaning of the Longshoremen's Act, but whether or not he was obliged to pay certain social security taxes.

Page 11 of the Petition for Writ of Certiorari also asserts that the decision of the Court of Appeals in this case is in conflict with *Norton* v. *Warner Co.,* 137 F. 2nd 57 (C. C. A. 3d, 1943), aff'd. 321 U. S. 565, 64 S. Ct. 747 (1944). To the contrary, however, that decision is sound authority for the decision of the Court of Appeals in this case and particularly in that it laid down the rule applied by the Court of Appeals in this case that the term "crew" applies to those "who are naturally and primarily on board" the vessel to "aid in her navigation" and that the subject employee, who was a bargeman who spent all his time day and night aboard the barge and did all work on the barge that was to be done "had that permanent attachment to the vessel which commonly characterizes a crew" (at 573), which is exactly the principle considered by the Court of Appeals in this case.

Thus the Petitioner is clearly mistaken in asserting that the instant decision is in conflict with other cases. As has been shown above, it is in harmony with those

cited in the Petition, saving of course the two which are irrelevant. The subject decision is also in accord with numerous other cases, however, some of which are these:

McKie v. *Diamond Marine Co.*, 204 F. 2d 132 (C. A. 5, 1953); *Gahagan Const. Corporation* v. *Armao*, 165 F. 2d 301 (C. C. A. 1st, 1948); *Carumbo* v. *Cape Cod S. S. Co.*, 123 F. 2d 991 (C. C. A. 1st, 1941); *Wilkes* v. *Mississippi Sand & Gravel Co.*, 202 F. 383 (C. A. 6, 1953), certiorari denied, 346 U. S. 817 (1953); *Gonzales* v. *Riverside & Fort Lee Ferry Co.*, 43 F. Supp. 366, (S. D. N. Y., 1942); *Rackus* v. *Moore-McCormack Lines*, 85 F. Supp. 185 (E. D. Pa., 1949); *Kraft* v. *A. H. Bull S. S. Co.*, 28 F. Supp. 437 (S. D. N. Y., 1939); and see also *Swanson* v. *Marra Brothers*, 328 U. S. 1, 66 S. Ct. 869 (1946); *Reyes* v. *A. H. Bull S. S. Co.*, 80 F. Supp. 223 (S. D. N. Y., 1948); *Mamat* v. *United Fruit Co.*, 39 F. Supp. 103 (S. D. N. Y., 1940).

This Honorable Court will also recall that under precisely the same circumstances as those in the instant case, that is, in the case of a railroad brakeman who was injured while on board a car float lying in navigable waters, the case of *O'Rourke* v. *Pennsylvania Railroad*, 344 U. S. 334, 73 S. Ct. 302 (1953), this Court held that "The Longshoremen's and Harbor Workers' Compensation Act applies" (at page 342). That, of course, is exactly the conclusion reached by the Court of Appeals in this case.

2. No Important Question of Federal Law is Involved in this Case.

This case does not involve a consideration or evolution of any principle of law. The opinion demonstrates that it involves only the application of well-settled principles to a specific set of undisputed facts.

The only question in this case was whether or not plaintiff's action under the Jones Act was to be dismissed where his own uncontested evidence established that at

the time of the accident he was a railroad brakeman engaged in doing the railroad work of tightening a brake. Moreover, not only is there no conflict as to principle involved, but in applying the fully accepted and generally established rules applicable here, the Circuit Court followed ample precedent in the manner in which it applied them as will be seen from the cases cited both above and hereafter in this brief. Thus it is entirely evident from the opinion of the Court of Appeals, whether read in part or in whole, that the Court was not attempting to lay down any general rule of liability or non-liability here, but was predicating its decision upon the peculiar facts of the case at hand in the light of well-established general principles.

3. The Decision of the Court of Appeals is Clearly Correct.

(a) *The Petitioner's Characterization of the Subject Decision is Unjustified.*

Plaintiff's undisputed testimony established that he was a railroad brakeman whose railroad work involved in small part the moving of freight cars on and off car floats and nothing more. He thus established himself as a member of a class Congress intended to cover by the provisions of the Longshoremen's and Harbor Workers' Compensation Act. The evidence he himself presented fails to provide any basis for the conclusion that he was "a member of a crew of a vessel" as that phrase of the Longshoremen's Act has been defined by prior decisions of this and other Federal Courts.

In so deciding, the Court of Appeals, after reviewing prior decisions, concluded that the standards by which the Courts have determined whether or not a person comes within the statutory definition of "a member of a crew" are (1) that the ship be in navigation, (2) that there be a more or less permanent connection with the

ship, and (3) that the worker be aboard primarily to aid in navigation" (Petition, p. 46). The Court next concluded that this car float was in navigation, that the plaintiff on the basis of his own testimony did not have a more or less permanent connection with the car float and that therefore he was not a member of a crew of a vessel and it was unnecessary to decide whether or not he was on board primarily to aid in navigation.

As will be demonstrated below, this decision was in complete accord with the principles and precedents laid down by earlier decisions of this and other Federal Courts.

Nevertheless, the Petitioner in pages 10 to 13 of his Petition has seen fit to describe this decision as setting up "an artificial, unwarranted, capricious standard", as depriving the Petitioner of the right to trial by jury, as ignoring "the fact that your Petitioner had multiple navigational duties including the one of tightening the brake" and that this decision was "the unlawful assertion of an arbitrary and capricious standard" which "presents an invitation in these cases to Courts below to ascribe various and sundry artificial unreasoning and unjustified bases as a means of which to distinguish, differentiate, all to the purpose of denying to seamen the remedies intended by the Congress of the United States for their protection, the net affect of which will be to degrade and lower their standards in the labor field to that of common laborers".

Respondent respectfully suggests that the terms quoted above cannot be applied with propriety to a decision which first extracts from earlier cases the established guiding principles and then considers the plaintiff's undisputed evidence in the light of those principles and concludes that evidence is not sufficient to justify the conclusion that plaintiff is a member of a crew of a vessel.

The plaintiff himself testified emphatically and by virtue of many different facts that he was a railroader

and only a railroader and that whether he was working on land or on water his work was always that of "railroader" and that he performed only railroad work which he performed 90% of the time on land and 10% of the time on water. The learned Trial Judge specifically so found in refusing to dismiss plaintiff's claim under the Federal Employer's Act (8a, 9a, 10a).

However, when this Court decided the case of *O'Rourke* v. *Pennsylvania Railroad*, and thereby left no room for doubt but that the plaintiff in this case had no cause of action under the Federal Employers' Liability Act, the plaintiff's testimony then changed not its facts but its tone. Although he was already committed by his earlier testimony to the obvious fact that he was a railroader and only a railroader, he seized upon certain of his incidental duties in order to enable him to use the vocabulary of a seaman and thus to suggest that he was in some manner connected with, as he put it, "the sea". For example, he seized upon the fact that neither he nor any other railroad brakeman would attempt to put freight cars on a float that was listing and by virtue of that fact claimed that it was part of his job to see whether the float had any list to either side and thus "whether it is seaworthy". Likewise, he seized upon the fact that neither he nor any other brakeman would put all heavy cars on one side of a float and all light cars on another side of a float and then went further and described that fact by saying that it was part of his job to see that the float "would not capsize". Proceeding to reason further from the fact that he would not put cars on a listing float, and that therefore he should look to see whether the float was listing, he stated further that a list could only be due to "something wrong with the water ballast" (131a) and that therefore it was his job to consider the ballast. And he also implied that it was further his job to consider which way the tide was flowing in case that should effect the manner in which he should put cars on the barge.

But it is evident to the objective eye that these are mere verbalisms describing wholly incidental inferences which flow from the fact that it was this man's job to move freight cars on and off floats.

This attempt to create an atmosphere of relationship to "the sea", as Petitioner put it, has been heightened by the tone of the Petition for Writ of Certiorari which includes in the statement of the case certain phrases ostensibly as facts but which are actually the propositions Petitioner seeks to prove. For example, the Petition asserts at page 6, "Mr. Zientek *had two jobs* with Reading Company". And on the same page, "Then, *as the crew of the floats,* he supervised moving the cars onto the floats * * *."

It is of course indisputable from the record that Mr. Zientek had only one job with Reading Company, namely, that of a brakeman and that he was not the crew of the floats, but that the floats had their own crews with which he had nothing to do. Those statements are not statements of fact but of conclusions which Petitioner seeks to establish. In the light of the precedents and principles referred to both above and below in this brief those propositions are wholly unjustified conclusions which the Court of Appeals quite properly rejected.

Many other examples of this same kind could be drawn from the Petition to illustrate the point that Petitioner's sole claim to any color of right to the appellation "member of a crew" is based upon extended word play which ought not to be regarded by the law as a basis for decision.

(b) *The Applicable Law.*

Plaintiff brought suit under the Jones Act, 46 U. S. C. A. § 688, and the essential facts of this matter, as correctly put in evidence by plaintiff himself, are simply that plaintiff was a railroad brakeman who was injured while setting a brake on a box car upon a car float lying in navigable waters.

In order to determine plaintiff's rights, therefore, it is necessary first to consider what law is applicable.

Since the accident occurred upon navigable waters, the decision of this Court in *O'Rourke* v. *Pennsylvania Railroad Company,* 344 U. S. 334, 73 S. Ct. 302 (1952), requires that we turn for the applicable rules to the maritime law of the United States.

Under the maritime law of the United States, those who load or otherwise service vessels lying in a harbor are protected by the provisions of the Longshoremen's and Harbor Workers' Compensation Act[1] which provides that any employer "any of whose employees are employed in maritime employment" shall be liable to pay compensation at the specified rates to any employee injured upon navigable waters. This Act further provides that the employer's liability thus imposed "shall be exclusive and in place of all other liability of such employer to the employee."[2]

In the *O'Rourke* case, the plaintiff was a railroad brakeman who was injured while in the process of releasing a brake on a box car upon a car float lying in navigable waters. He brought suit under the Federal Employers' Liability Act[3] and that action was in effect dismissed by this Court. Plaintiff O'Rourke did not maintain that he was anything but a railroad brakeman, as he in fact was, and in that case this Court specifically held as follows:

> Therefore respondent (O'Rourke) comes within the coverage of that portion of § 903(a) (of the Longshoremen's and Harbor Workers' Compensation Act) that includes those outside the reach of state compensation laws * * *. (at 337)

* * * * * * *

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[1] 33 U.S.C.A. § 901, *et seq.*
[2] 33 U.S.C.A. § 905.
[3] 45 U.S.C.A. § 51.

The Longshoremen's and Harbor Workers Act applies. (at 342) (Parenthetical phrases added.)

Plaintiff Zientek, however, seeks to take advantage of that provision of the Longshoremen's and Harbor Workers' Compensation Act which excepts from the employees covered thereby any employee who is a "member of a crew of a vessel."[4]

His purpose in so doing was effectively explained by his attorney to the jury at the trial (229a) when he pointed out that, as he put it, the defendant was attempting to "make" the plaintiff "a longshoreman" because to do so was "cheaper for the company" (229a), that is, that by claiming to be a member of a crew of a vessel, the plaintiff could reasonably hope to obtain a greater sum of money than if his rights were to be determined by the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

Of course the plaintiff did not seriously maintain that he actually *was* a member of a crew of a vessel in the literal or commonly accepted sense of those words. In-

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[4] 33 U.S.C.A. § 903. The pertinent provisions of the Act are as follows:

§ *902 Definitions.* When used in this chapter—

* * * * * * *

(3) The term "employee" does not include a master or member of a crew of any vessel * * *

(4) The term "employer" means an employer any of whose employees are employed in maritime employment in whole or in part upon the navigable waters of the United States * * *

§ *903 Coverage.* (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death resulting from an injury occurring upon the navigable waters of the United States * * * No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel * * *

§ *904. Liability for Compensation.*

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908 and 909 of this chapter * * *

§ *905. Exclusiveness of Liability.* The liability of an employer prescribed in § 904 of this chapter shall be exclusive and in place of all other liability of such employer to the employee * * *

stead he conceded frankly that he was a railroad brakeman doing the work of a railroad brakeman 90% on land and 10% on car floats. His attorney put it this way to the jury:

> Mr. Zientek is the man seated in the front row; he has been employed by Reading Company for many years. He is a railroader generally, that is, he works in and around railroad cars, but a very, very interesting question has arisen * * * (84a) * * * Ordinarily, one would assume that he was a railroader; he is in a sense a brakeman; he is on land more often than he is on water; he sets brakes and makes couplings between cars * * * and does work of that sort; he gives signals and throws switches, all the work of railroaders, and essentially you would assume from the beginning of this case that he was a railroader. That is what he thought. But lo and behold * * * (85a). * * * The Supreme Court decided one question, that is, that he is no longer a railroader. He suddenly changed his characteristic and became some kind of maritime employee. So you will have to listen and decide for yourselves, is he now a seaman or a longshoreman? We say he is a seaman (86a).

In other words, while in reality the plaintiff is, and regards himself as, a railroad brakeman, in order to maximize his recovery he will say he is a seaman.

The Learned Trial Court described this situation in its charge to the jury with at least equal precision:

> Actually, he is a railroader, there is no doubt about that; that is admitted. His professional status is that of a railroader. (266a) * * * He was a railroader, and he is a railroader by profession, but for the purpose of redressing his

> rights he has to satisfy you that he is a seaman or he cannot recover. (267a)

Thus the issue here, at least as framed by the plaintiff and his counsel and as understood by the Judge and explained to the jury, is:

> Given a man who is a railroad brakeman, can we say he is a member of a crew of a vessel in order to maximize his recovery?

Or rather, since we obviously *can* say so, the question ought rather to be, *should* we say so?

How we should reply to that question depends of course upon the principles to which we turn for guidance.

If the principles to which we turn for guidance here are to be drawn from any body of thought other than the law—sociology, for example—it might be that there could be found a principle which would move us to conclude that the plaintiff ought to recover the larger of these two possible sums and that therefore we ought to denominate him a seaman in order that he may do so. But to state such reasoning explicitly is to expose its weakness, for it is the primary function of our Courts to administer first the rules of law as they exist in the Acts of Congress and the decisions of this and other Federal Courts rather than to subordinate them to any other principles of more limited acceptance.

Under the rules of law, this plaintiff is excluded from the protection of the Longshoremen's and Harbor Workers' Compensation Act if he is a "member of a crew of a vessel" as that phrase has been heretofore defined by the courts and *not* if he is instead a railroad brakeman whose only claim to the appellation "seaman" or "member of a crew" is a unilateral desire to the greater of two possible recoveries. In order to decide this question therefore we ought to consider comparable cases.

When that is done, two guiding legal considerations emerge:

(1) In adopting the Longshoremen's and Harbor Workers' Compensation Act, it was the intention of Congress to include within its operations all those persons whose duties take them aboard ships, *other than* those persons whose primary duties are concerned with the navigation of the vessel. And it was the particular intention of Congress to include within the provisions of the Longshoremen's and Harbor Workers' Compensation Act those engaged in the loading and unloading of vessels.

So said this Court in the case of *South Chicago Coal & Dock Co. et al.* v. *Bassett,* 309 U. S. 251 at 256, 257, 60 S. Ct. 544 (1940):

> The legislative history of the exception now before us (that is, the exception in the Longshoremen's Act relating to the master and members of a crew of a vessel) throws light upon the intention of Congress. For those employees who are entitled to compensation, the remedy under the act is exclusive. § 5. This made inapplicable to such employees the provision of § 33 of the Merchant Marine Act (called the Jones Act) which carried to "seamen" at their election the benefit of the provisions of the Federal Employers' Liability Act. The bill, which became the Longshoremen's and Harbor Workers' Compensation Act, was at one stage amended so as to include a master and members of a crew of a vessel owned by a citizen of the United States. They preferred however to remain outside the compensation provisions and thus to retain the advantage of their election under the Jones Act, and the bill was changed accordingly so as to exempt "seamen". Then at its final passage, the words "a master or member of a crew" were

substituted for "seamen". We think that this substitution has an important significance here. For we had held that longshoremen engaged on a vessel at a dock in navigable waters, in the work of loading or unloading, were seamen (citing cases). And, also, that such seamen if injured on a vessel in navigable waters, unlike one injured on land, could not have the benefit of a state workmen's compensation act (citing cases). *We think it is clear that Congress in finally adopting the phrase "a master or member of a crew" in making its exception intended to leave entitled to compensation all those various sorts of longshoremen and harbor workers who were performing labor on a vessel and to whom state compensation statutes were inapplicable.*" (Parenthetical phrases and emphasis added.)

(2) In defining the phrase "member of a crew of a vessel", the Courts of the United States have consistently held that although persons other than able seamen (such as cooks, carpenters and similar tradesmen) may well be "members of the crew", those persons whose duties are chiefly the loading or unloading of a vessel are *not* members of the crew of a vessel even though they may have secondary and occasional duties of the kind sometimes performed by seamen.

The following examples may suffice:

Braner v. *Brooklyn Eastern District Terminal*, 46 F. Supp. 302 (E. D. N. Y., 1942). Action under the Jones Act to recover damages for death of plaintiff's decedent. Defendant moved for summary judgment upon the ground that the Longshoremen's and Harbor Workers' Compensation Act furnished plaintiff with her exclusive remedy. This motion was granted for the following reasons:

Defendant owned the tug *Invincible* which towed various car floats. Decedent Braner's job was to go aboard the car floats and perform the duties described below. He had no duties aboard the *Invincible*.

It appears from the opinion, as to Braner's duties, that,

> * * * for four nights of each week he acted as float-man; two nights of each week he stayed ashore and worked as bridge-man at the terminal, and the other night of each week he was off duty. He never had meals on board the *Invincible* nor slept thereon. The affidavit further recites that when Braner acted as a float-man he was in complete charge of the car floats; that his duties thereon were to check and see that the brakes on the railroad cars were properly set; that the wheels were securely chocked and chains fastened to the draw-heads. He was required to check the cars and keep a record of the car numbers. It was his duty to examine the car float and the railroad cars for damage, and what water was in the bilge, and see if all the lines and skids required to be aboard were aboard, and to note their condition. It was his duty to put lights around the car float and to see that these lights remained while the float was in tow. He was charged with the duty of keeping the lights clean and filled with oil. He handled the lines in response to the master's orders, but was otherwise in complete charge of and responsible for the car float or car floats. No member of the crew of the *Invincible* was charged with or performed any of these duties. On the other hand, Braner had no duties with respect to the *Invincible* in connection with its navigation, operation or other use, and performed no duties aboard the tug. Braner's time sheet record was

kept by the chief dispatcher of the defendant and not by the master of the *Invincible,* nor did the master assign Braner or any other float-man to work on the car floats. Such assignment was made by the chief dispatcher of the defendant. (303)

Held: not a member of a crew of a vessel.

Kraft v. *A. H. Bull Steamship Company, Inc.,* 28 F. Supp. 437 (S. D. N. Y., 1939).

Action under the Jones Act. Defendant defended upon the ground that plaintiff's exclusive remedy was under the Longshoremen's Act. The District Court in this opinion found for the defendant.

The plaintiff had been hired as a member of the shore gang. His duties as such consisted in "shifting ships, cleaning holds, getting the hold ready for cargo, chipping rust, dock work, and handling supplies, cleaning up the north side of the pier." Seventy-five per cent of the work was on board ship and twenty-five per cent was on land. "Generally, the work was that which sailors are required to do while the vessel is laid up at the docks." (439)

The plaintiff "did not go outside New York harbor on a ship; did not sleep on the ship; did not eat there; except when the vessel was away from its dock or going from dock to dock in the harbor. He was attached to no one ship but might work on two or three a day. Could it be said that he was a member of the crew of each of such ships? I think not" (439).

> It would be a strained construction to say, under all these circumstances that at the time of this accident, Libellant was a member of the ship's company. A more common sense view and one supported by the cases is that he was a member of a "shore gang" attached to no particular ship, going from ship to ship at the command of his superior who likewise was at-

tached to no ship and, in addition, that he was a standby seaman ready to take the place of a crew member when there was a vacancy; but this did not occur (439, 440).

Held: not a member of a crew of a vessel.

South Chicago Coal & Dock Co. et al. v. *Bassett, Deputy Commissioner,* 309 U. S. 251, 60 S. Ct. 544 (1940) (*supra*).

This Court held that the facts of record constituted sufficient evidence to sustain a finding by Deputy Commissioner that the person on account of whose death compensation was claimed under the Longshoremen's Act was not a member of a crew of a vessel.

The subject vessel was a lighter used for fueling steamboats and other marine equipment. It supplied coal to the other vessels on their order, each operation consuming only a couple of hours. It had no sleeping or eating quarters. The chief task of the decedent was to facilitate the flow of coal from the lighter to the vessel being fueled, removing obstructions to the flow with a stick. "He performed such additional tasks as throwing the ship's rope in releasing or making the boat fast. He performed no navigation duties. He occasionally did some cleaning of the boat. He did no work while the boat was en route from dock to the vessel being fueled." He had no duties while the boat was in motion; he was paid an hourly wage; he slept at home and boarded off the ship; he was called very early each morning on the day that he was wanted.

Said this Court at page 260:

> Regarding the word "crew" in this statute as referring to the latter class,* we think there

* that is, "persons serving on vessels whose service is that of laborers of the sort performed by longshoremen and harbor workers as distinguished from those employees on the vessel who are naturally and primarily on board to aid in their navigation."

was evidence to support the finding of the Deputy Commissioner. * * * The question concerns his actual duties. These duties, as the Court of Appeals said, did not pertain to navigation, aside from the incidental task of throwing the ship's rope or making the boat fast, a service of the sort which could readily be performed or aided by a harbor worker. What the court considered as supporting the finding of the Deputy Commissioner was that the primary duty of the decedent was to facilitate the flow of coal to the vessel being fueled, that he had no duties while the boat was in motion, that he slept at home and boarded off the ship and was called each day as he was wanted and was paid an hourly wage. Workers of that sort on harbor craft may appropriately be regarded as "in the position of longshoremen or other casual workers on the water."

Held: not a member of a crew of a vessel.

Gonzales v. *Riverside & Fort Lee Ferry Co.*, 43 F. Supp. 366 (S. D. N. Y., 1942).

Action under the Jones Act. Defendant moved to dismiss upon the ground that the Longshoremen's and Harbor Workers' Act provided plaintiff's exclusive remedy. The District Court for the Southern District of New York granted defendant's motion and dismissed the plaintiff's libel.

Libelant's duties are described in this opinion as follows:

> The respondent operated a number of ferry boats across the Hudson River. * * * In 1938 Libelant was employed as a fireman on board one of these ferry boats. Sometime in 1939 the character of his work was changed. Detailed

work records from January 1, 1940 to the date of the accident show him predominately engaged in demolishing a ferry house, making appliances in the work shop, readying ferries by loading coal, removing ashes and cleaning boilers, maintaining steam in stand-by ferries, greasing ferry fenders and slip piles and tending the terminal grounds.

Upon the day of his accident, he was engaged in greasing fenders aboard a particular ferry while that ferry was crossing the river.

> The libelant was not employed under articles. This was equally true of the master mate, fireman and oiler. The libelant slept and ate ashore. The other employees on board the *Tenafly* (the vessel in question) did likewise. All the employees including the libelant were paid hourly wages. Libelant had no duties directly connected with the navigation of the ferries except on several occasions when he was fireman or oiler, unless fender greasing be so regarded. There is conflict in the evidence as to whether he was under the direction of the ship's officers or the shore superintendent. I regard the evidence in favor of the latter alternative as the more creditable.
>
> These facts compel the conclusion that the libelant was not a member of the *Tenafly*.
> (Parenthetical phrase supplied.)

Held: not a member of a crew of a vessel.

Rackus v. *Moore-McCormack Lines Inc.*, 85 F. Supp. 185 (D. C., E. D. Pa., 1949).

Plaintiff employee brought an action for damages against defendant employer for personal injuries suffered by plaintiff in the course of his employment aboard the

defendant's vessel. Defendant moved to dismiss upon the ground that the plaintiff's exclusive remedy was under the Longshoremen's and Harbor Workers' Compensation Act and that the plaintiff was not a member of the crew of a vessel. That motion was granted by virtue of the following considerations.

This plaintiff was hired to work aboard a vessel,

> * * * for the specific purpose of assisting in the discharge of a cargo from that ship; that he entered upon such duty; and that he was subject to orders, and took orders, from the hatch foreman, the stevedore foreman of the defendant, who hired the plaintiff.
>
> From these facts it must follow that the plaintiff was not a member of the crew, or a "seaman" within the meaning of the Jones Act. "The requirements that the ship be in navigation; that there be a more or less permanent connection with the ship; and that the worker be aboard primarily to aid in navigation appear to us to be the essential and decisive elements of the definition of a 'member of the crew'." *Carumbo* v. *Cape Cod Steamship Co.*, 123 F. 2d at page 995, and cases therein cited. The plaintiff had no "more or less permanent" connection with the ship; he was primarily aboard to perform the sort of service rendered by a stevedore. (Citing cases.)
>
> *Held:* not a member of a crew of a vessel.

Posavec v. *Merritt-Chapman & Scott Corp., et al,* 106 F. Supp. 170 (S. D. N. Y., 1952).

This was an action brought under the Jones Act for the death of decedent. Defendant moved to dismiss upon the ground that its sole liability was under the Longshoremen's and Harbor Workers' Compensation Act. This

opinion holds that decedent was not a member of a crew of a vessel and therefore had no right under the Jones Act.

The decedent had been employed aboard a barge loaded with gravel and sand. He was employed as a night watchman. He boarded the barge each night and left it the following morning. His chief responsibility was that if anything on board should occur while he was on duty, to telephone someone who occupied an engineer's shack on the shore. The barge was without motive power and upon occasions when it was towed decedent had nothing to do with its navigation. At the time of the accident the barge was at anchor nearby a bridge.

Held: not a member of a crew of a vessel.

In the light of these precedents and the agreed facts of record in this case, plaintiff Zientek, who did not even know the vessel of which he desired to be called a crew member,* obviously was not a member of a crew of a vessel as that phrase has been defined by the Courts. Consequently, the decision of the Court of Appeals was correct.

CONCLUSION.

The Petition for Writ of Certiorari ought to be dismissed for these reasons:

1. The decision of the Court below involves no conflict with any other decision or principle but is in complete harmony with the law and cases upon the subject of the meaning of the phrase "member of a crew of a vessel" as used in the Longshoremen's Act.

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*There were 20 or 22 barges involved (163a). Plaintiff Zientek testified that he thought he had been injured while upon No. 12 but was not positive (163a). His counsel stipulated that it was No. 14 (221a).

2. No important question of Federal Law is involved in this case. This case is concerned only with whether or not the plaintiff's undisputed testimony, when judged in the light of the principles and precedents laid down by earlier decisions of this and other Courts, is sufficient to enable reasonable men to differ upon whether or not he was a member of a crew of a vessel.

3. The Court below was correct in holding that where the plaintiff's own undisputed evidence established that at the time of his accident he was a railroad brakeman engaged in tightening a brake on a box car and that all of his work was the work of a railroad brakeman engaged in part to move freight cars on and off a car float, he cannot reasonably be described as a member of a crew of a vessel.

Respectfully submitted,

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Office - Supreme Court, U. S.
FILED
JUL 2) 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1954.

No. 120.

LEO A. ZIENTEK,
Petitioner,

v.

READING COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Petitioner's Reply Brief.

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TABLE OF CASES.

	Page
Bowen v. Shamrock Towing Co., 139 F. 2d 674 (C. C. A. 2, 1943)	2
Braner v. Brooklyn Eastern District Terminal, 46 F. Supp. 302 (D. C. E. D. N. Y., 1942)	1
Cantey v. McLain Line, 312 U. S. 667, 61 S. Ct. 829 (1941)	2
Diomede, et. al. v. Lowe, 87 F. 2d 296 (C. C. A. 2, 1937)	2
Gonzalez v. Riverside & Fort Lee Ferry Co., 43 F. Supp. 366 (D. C. S. D. N. Y., 1942)	1
Kraft v. A. H. Bull S. S. Co., 28 F. Supp. 437 (D. C. S. D. N. Y., 1939)	1
Nogueira v. New York, N. H. & H. R. Co., 281 U. S. 128, 50 S. Ct. 303 (1930)	7
Pennsylvania Railroad Company v. O'Rourke, 344 U. S. 811, 73 S. Ct. 11 (1952)	4, 7
Pennsylvania R. Co. v. O'Rourke, 344 U. S. 334, 73 S. Ct. 302 (1953)	7, 9
South Chicago Coal & Dock Co., et al. v. Bassett, 309 U. S. 251, 60 S. Ct. 544 (1940)	3, 4

TABLE OF AUTHORITIES.

	Page
The Federal Employers' Liability Act, 45 U. S. C. A. § 51 et seq.	6, 7
The Jones Act, 46 U. S. C. A. § 688 et seq.	6, 7
The Longshoremen's & Harbor Workers' Compensation Act, 33 U. S. C. A. § 901 et seq.	7

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PETITIONER'S REPLY BRIEF.

The respondent's brief in opposition to the petition for Writ of Certiorari has now been filed. It is now obvious that the petition should be granted. Respondent has not answered or even attempted to contest our argument that Mr. Zientek's status as a member of the crew was a question for the jury. It cannot answer us.

Instead of answering this argument, respondent, as did the Court of Appeals, relies upon cases which decided *as a question of fact* that a particular individual was not a member of a crew. This supports our contention that the Court below erred in ruling *as a matter of law* that Mr. Zientek was not a member of a crew. *Gonzalez v. Riverside & Fort Lee Ferry Co.*, 43 F. Supp. 366 (D. C. S. D. N. Y., 1942), *Kraft v. A. H. Bull S. S. Co.*, 28 F. Supp. 437 (D. C. S. D. N. Y., 1939). Respondent's Brief, p. 36.

Respondent also cites the case of *Braner v. Brooklyn Eastern District Terminal*, 46 F. Supp. 302 (D. C. E. D. N. Y., 1942). That case has been overruled by this Court's

decision in *Cantey v. McLain Line,* 312 U. S. 667, 61 S. Ct. 829 (1941).

The *Braner* case relied upon the case of *Diomede, et al. v. Lowe,* 87 F. 2d 296 (C. C. A. 2, 1937). But in *Bowen v. Shamrock Towing Co.,* 139 F. 2d 674 (C. C. A. 2, 1943), the Second Circuit pointedly noted that *Diomede,* upon which the respondent so heavily relied, was specifically *overruled* by this Court. The Second Circuit noted that this Court overruled *Diomede* as follows :

> "The Longshoremen's and Harbor Workers' Compensation Act excludes from its provisions 'A master or member of a crew of any vessel'. 33 U. S. C. A. § 903 (a) (1). Unless excepted by this clause, the plaintiff's remedy against his employer must be sought under the Act, 33 U. S. C. A. § 905; South Chicago Co. v. Bassett, 309 U. S. 251, 256, 60 S. Ct. 544, 84 L. Ed. 732. The cases involving bargemen employed on vessels without motive power of their own have left in some uncertainty the question whether such employees are within or outside the coverage of the Compensation Act. Considering himself bound by our decision in Diomede v. Lowe, 2 Cir., 87 F. 2d 296, certiorari denied Moran Brothers Contracting Co. v. Diomede, 301 U. S. 682, 57 S. Ct. 783, 81 L. Ed. 1340, the District Judge held that the plaintiff was within the Act's coverage. It is the contention of the appellant that the Diomede decision cannot be deemed controlling in view of Cantey v. McLain Line, 312 U. S. 667, 61 S. Ct. 829, 85 L. Ed. 1111.
>
> "We think this contention is sound. Diomede v. Lowe, supra, held that the bargee of a dump scow, whose widow claimed compensation under the Act, was within its coverage, although the deputy commissioner had found to the contrary. The Cantey case, like the case at bar, involved a suit brought by a bargee under the Jones Act. Exceptions asserting that Cantey was entitled to compensation as a harbor worker were sus-

tained by the District Court, 32 F. Supp. 1023, and we affirmed on the authority of the Diomede case. Cantey v. McLain Line, 2 Cir., 114 F. 2d 1917. In a brief Per Curiam, 312 U. S. 667, 61 S. Ct. 829, 85 L. Ed. 1111, the Supreme Court reversed, remanding the cause to the District Court for further proceedings and citing as authority South Chicago Co. v. Bassett, 309 U. S. 251, 258, 259, 60 S. Ct. 544, 84 L. Ed. 732. Thus the Cantey case appears to be indistinguishable from the case at bar, unless a distinction can be found in the fact, stressed by the appellee, that Cantey's barge was in tow at the time of the accident while the appellant's barge was tied up at a pier. We do not regard this as a material difference. A vessel is not withdrawn from navigation by being tied up for a short time awaiting a new cargo. See Hawn v. American S. S. Co., 2 Cir., 107 F. 2d 999, 1000; Carumbo v. Cape Cod S. S. Co., 1 Cir., 123 F. 2d 991, 995. And whether or not a barge is in tow at the time of his accident does not necessarily determine whether the bargee is 'a master or member of a crew of any vessel'. We think the Cantey case is controlling."

Finally, respondent at pp. 32-39 cites the facts of cases ending each summary with the cryptic notation:

"Held: Not a member of a crew of a vessel."

Included in these cases are the ones mentioned above and *South Chicago Coal & Dock Co. et al. v. Bassett*, 309 U. S. 251, 60 S. Ct. 544 (1940). It so held as a *fact* determination. Clearly, the respondent fails to recognize the principle that the *Bassett* case enunciates. ***It held that the determination of whether a man is a member of a crew or not is exclusively the function of the fact finding body—whether it be a referee, a deputy commissioner, a jury, or a judge sitting as a jury.***

Respondent's own summary of the holding of that case reads as follows (p. 35):

> "This Court held that the facts of record *constituted sufficient evidence to sustain a finding* by Deputy Commissioner that the person on account of whose death compensation was claimed under the Longshoremen's Act was not a member of a crew of a vessel." (Emphasis ours.)

We contend no more than respondent admits that that case holds. That admission renders erroneous the unwarranted attempt of the Court of Appeals below in ruling on the question as a matter of law. *We insist that the fact finding body alone had the power to decide this question of fact in this case.*

Respondent answers our argument that the instant case is in conflict with *South Chicago Coal & Dock Co. v. Bassett, supra,* by distorting it. (Respondent's Brief, P. 11.)

Of course, the ultimate result in *South Chicago Coal & Dock Co. v. Bassett, supra,* is that the employee was held as *a finding of fact*—not to be a member of a crew. Obviously, the instant case in its present posture places petitioner in the same status. Who decided what Bassett's status was? The answer is that the Deputy Commissioner so decided. This Court did not allow the District Court to replace that finding *of fact* by the Deputy Commissioner with its own conclusion.

Here, the jury, in place of the Deputy Commissioner, has decided the petitioner's status. The Court of Appeals has replaced that finding by its own conclusion. That, this Court cannot and must not permit. The right to trial by jury under the Seventh Amendment of the Constitution would thus be violated.

The issue involved in this case is of the highest importance. It is unfortunate that when the Petition for Certiorari was presented to this Court in *Pennsylvania Railroad Company v. O'Rourke,* 344 U. S. 811, 73 S. Ct. 11 (1952), this Court was in no position to then know that it

was in fact considering a Petition for a Writ in a case in which the whole issue would not be before it for decision.

In that case, counsel for the respective parties had stipulated that the Court was to decide only whether the Federal Employers' Liability Act applied to the facts of that case. If the Court decided that the Federal Employers' Liability Act did not apply, then the Court was limited to a finding that the case was one which fell within the confines of the Longshoremen's and Harbor Workers' Compensation Act. That fact was not revealed until after Petition for Certiorari had been granted, briefs had been written and the case had been argued. Then, after all this had been completed, a petition was filed for leave to intervene amicus curiae on behalf of certain national railroad labor groups. Those groups argued as we do here, that the Court should give consideration to the question of whether O'Rourke might not come within the purview of the Jones Act if he was not covered by the Federal Employers' Liability Act. Counsel for the petitioner (the railroad company) then filed an answer to the amicus curiae petition for leave to intervene in which he correctly stated that *the question could not be considered nor decided by the Court as the Jones Act had been stipulated out of the case.*

This rendered the grant of certiorari in that case improvident. The Court had been stultified by the action of counsel and was not able to consider and determine the entire issue under all of the then extant laws that could possibly cover the factual picture present in that case. This Court now has before it a case in which the facts eloquently speak on behalf of the contention of the petitioner that he is a member of the crew. The jury (fact-finding body) so found. The record supports it. This entire issue is now ripe for decision so that the whole field may be considered and decided with clarity and certainty.

Congress has enacted three different pieces of legislation concerning master servant accidents. It has enacted the Federal Employers' Liability Act, the Jones Act, and

the Longshoremen's and Harbor Workers' Compensation Act. It has not repealed any of them. They are all in full force and effect concurrently.

We must assume that Congress in passing new legislation and not repealing any prior legislation did so with the thought in mind that it was filling an important void in this field of interstate commerce. We must assume that in enacting later legislation it was filling a gap that earlier legislation left open or that new development revealed. We must assume that in enacting new legislation it did so without intending to create a conflict between the several pieces of legislation. It is our function to try if possible to reconcile the effect of the several pieces of legislation so that they represent together a harmonious, sensible and intelligent plan for the protection of the several classes of employees. We must assume the plan was drawn with the thought in mind of providing to each his just reward and protection.

When the Federal Employers' Liability Act was written in 1908 and became known as 45 U. S. C. A. § 51 et seq., inter alia it said this:

> "Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury or death resulting . . . by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, *boats, wharves,* or other equipment . . ."

In 1939, when this entire statute was up for review by the Congress of the United States with the thought in mind of making such corrections and improvements on behalf of the *employees* as the decisional history of the statute indicated was necessary, the words "boats, wharves" that had been a part of the statute since 1908 were *not* deleted from

the statute. In 1920, when the Jones Act was enacted, it adopted the Federal Employers' Liability Act verbatim by reference and became known as 46 U. S. C. A. § 688 et seq. In 1927, when the Longshoremen's and Harbor Workers' Compensation Act was enacted, as amended in 1938, it became known as 33 U. S. C. A. § 901 et seq. In no way did it make reference to either the Federal Employers' Liability Act or the Jones Act.

It is contended by the respondent that when this Court decided the case of *Pennsylvania R. Co. v. O'Rourke*, 344 U. S. 334, 73 S. Ct. 302 (1953), it implicitly decided that no railroad company employee could recover for injuries sustained on a boat under the Federal Employers' Liability Act. If under no circumstances whatsoever could such employees recover while on a boat on the navigable waters of the United States, then the words "boats, wharves" in the statute are surplusage and misleading and hold a promise of protection to employees which this Court has voided. The respondent claims that the sole remedy available to railroad company employees for injuries sustained on a boat or wharf is the Longshoremen's and Harbor Workers' Compensation Act. It contends that the words "boats, wharves" are superannuated appendages rendered meaningless by the passage of time and the decision of this Court in *Nogueira v. New York, N. H. & H. R. Co.*, 281 U. S. 128, 50 S. Ct. 303 (1930) and that the failure to delete these words when the Federal Employers' Liability Act was overhauled in 1939 was mere oversight. The answer of course is that Congress did not indulge in surplusage or oversight. Congress did not either in 1908 or in 1939 hold forth vague and illusionary promises of protection to men while on boats and wharves who are employed by railroad companies or the maritime industry.

There had been no separate statute spelled out when the Jones Act was written. It was created by reference to the Federal Employers' Liability Act which Congress bodily adopted as the Jones Act. "Boats, wharves" are

inherently of the essence in Jones Act cases. The words "boats, wharves" were not deleted from the Federal Employers' Liability Act for to have done so would have been to delete those words automatically from the Jones Act too. To have deleted these words in 1939 would have been in effect a repeal of the Jones Act. When else does the Jones Act come into play so clearly and frequently as when seamen who are members of a crew are working on and about the navigable waters on "boats, wharves"? It would necessarily result in seamen being reduced to longshoremen or harbor worker status so far as work injuries sustained on "boats, wharves" are concerned. Congress did not intend to reduce these men in status. It did not do so. It intended that they enjoy the Jones Act protection. The respondent's contention would naturally vitiate this uncontradictable Congressional intendment. The legislative history of the Jones Act proves that the reason Congress did not write a whole, new, *separate* act in 1920 for seamen was that it decided that these two words—"boats, wharves"—in the Federal Employers' Liability Act made its coverage adequately broad to cover every situation in which members of the crew might sustain injury and, therefore, was a ready-made statute sufficient in itself to adopt by reference for the protection of seamen.

Moreover, Congress knew that men employed by railroad companies, who are railroaders, sometimes hold dual positions where for short periods of time they become seamen who are members of the crew who may find themselves upon vessels on the navigable waters of the United States where they may sustain injury. It did not intend to make fish out of one and fowl of the other. Whether hurt on land or sea, Congress was thus providing identical protection for all railroad company employees. Under the respondent's contention, had another vessel of the defendant struck the barge on which the petitioner was working and capsized it so that not only was he injured, but also the engineer on the locomotive which was then on land,

and had both sustained the same injury, their measure of damages would vary shockingly. Congress did not intend thus to separate equal brother workers. It kept them on an even keel—since the Federal Employers' Liability Act and the Jones Act are identical in language and measure of damages.

The difficulty with the *O'Rourke* case, *supra,* was that the plaintiff there sought to impose upon a maritime tort, remedies limited to land operations. O'Rourke resisted the application of the Longshoremen's and Harbor Workers' Compensation Act because it lowered him in the labor eschelon and afforded him protection much lower than that given to fellow railroaders or to others of the same pay and labor status. O'Rourke's error was in failing to pursue the proper remedy provided by Congress for him. Under another name Congress had provided the same benefits via the Jones Act. Inasmuch as the Jones Act is but the reenactment of the Federal Employers' Liability Act and carries with it in addition the benefit of maintenance and cure, the error was that of counsel. But the Court could not twist the legislation to correct the error of counsel. The Court was helpless to remedy that situation because of the stipulation previously mentioned. All that was decided in *O'Rourke* was that his remedy did not come under the F. E. L. A. It did not, indeed it could not decide that he was not or could not be protected by the Jones Act. That depends on the facts of each particular case.

Today, the Court is in a position to review this entire field of legislation and place each in its proper position so that each class of labor may obtain the protection Congress intended and believed it had provided for it. This solution is the only answer to the searching query presented by the minority opinion in the *O'Rourke* case. The *O'Rourke* case can maintain its validity and yet men who render *both* railroading and maritime service, have complete accident protection of equal value available to others doing the same class of work within the same locus as this

accident, if this Court will now review these three statutes and give to petitioner and all like him the intended remedy—the Jones Act.

We must be realistic. Frequently, men serve a single master in dual capacities. Sometimes separate and distinguishable remedies are provided, dependent upon the nature of the duties being performed at the moment of the accident, as well as its location. The master must not be permitted and Congress did not intend that the benefits of such dual service may be taken by the master, without requiring him to be subject to the applicable statutory obligations attendant the job status of the movement.

Conclusion.

Zientek and 200,000 others are required by the American Railroads to serve in dual capacities—sometimes as a railroader and sometimes as a seaman who is a member of the crew. He and they are entitled to the Congressional protection intended by the several statutes. Today, for the first time, this novel, important, all embracing question of national scope that cuts so wide a swathe in the field of Interstate Commerce is before the Court. Inseparable here from such issues, is the right to trial by jury guaranteed by the Federal Constitution! Can this Court ignore these primordial issues that beg for decision here? We believe not. Thousands upon thousands of railroad company employees who are momentarily members of crews pray not.

Respectfully submitted,

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